FILE COPY

No. 439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

SANDERS BROTHERS RADIO STATION

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

APPENDICES TO BRIEF FOR RESPONDENT.

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SANDERS BROTHERS RADIO STATION

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

APPENDICES TO BRIEF FOR RESPONDENT.

APPENDIX A.

Legislative History of Pertinent Provisions of Communications Act of 1934.

I. GENERAL.

The pertinent provisions of the Communications Act of 1934[1] are, with very few exceptions, derived from the Radio Act of 1927, as amended, either *verbatim* or with minor modifications. Discussion of particular provisions will be

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by Act of June 5, 1936, c. 511, 49 Stat. 1475, and as amended by Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. 151 *et seq.*

prefaced with a brief review of the history of the Radio Act of 1927[2] as a whole.

The first statute regulating radio communication as such, the Radio Act of 1912,[3] is important to this history more because of what it omits than because of what it contains. Its cornerstone is Sec. 1, which in substance forbids the use or operation of any apparatus for radio communication as a means of commercial intercourse

> "except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor."

Congress intentionally withheld from the Secretary any delegation of legislative authority,[4] preferring to incorporate a series of specific regulations in the Act. No statutory standard was provided to guide the Secretary in the granting or denying of licenses and, as construed from time to time by the courts and the Attorney General, the Act limited the Secretary's functions to little more than the conduct of a registration bureau, with no discretion to refuse a license to a citizen of the United States or an American corporation (including a corporation controlled by alien interests), and no power to fix or regulate the frequency (wave-length), hours of operation or power of radio stations, so as to avoid interference, or even to fix the duration of licenses.[5] No provision was made for hearing before

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[2] Act of Feb. 23, 1927, c. 169, 44 Stat. 1162-1174, 47 U. S. C. 81 *et seq.*

[3] Act of Aug. 13, 1912, c. 287, 37 Stat. 302, 47 U. S. C. 51 *et seq.*

[4] S. Rep. 698, 62d Cong., 2d Sess. (1912); 29 Op. Attys. Gen. 579, (1912); 35 Op. Attys. Gen. 126, (1926).

[5] Opinion of Attorney General Wickersham, Nov. 22, 1912, 29 Op. Attys. Gen. 579; Hoover v. Intercity Radio Co., Feb. 5, 1923, 52 App. D. C. 339, 286 F. 1003 (affirming a decision of the Supreme Court of the District of Columbia, Nov. 23, 1921, not reported but summarized in Stephen Davis, *Law of Radio Communication*, New York, 1927, pp. 37, 41); United States v. Zenith Radio Corporation, N. D. Ill. E. D., April 16, 1926, 12 F. (2d) 614; Opinion of Acting Attorney General Donovan, July 8, 1926, 35 Op. Attys. Gen. 292. See also, Carmichael v. Anderson, July 19, 1926, 14 F. (2d) 166,

the Secretary except by implication in connection with his power to revoke licenses "for repeated violations" of the specific regulations in the Act.[6] No provision was made for appeal from the Secretary's determinations, and aggrieved parties were forced to resort to other methods of obtaining judicial review.[7]

For several years after the advent of broadcasting late in 1920, impending disaster was staved off through a series of four annual industry conferences held 1922-1925 under the auspices of Secretary of Commerce Hoover.[8] Recommendations resulting from these conferences exercised a great influence in directing attention to defects in the statute and were extensively used as a basis for the proposed legislation which ultimately became the Radio Act of 1927.[9]

Unfortunately, before the needed legislation could be enacted, enforcement of the Radio Act of 1912 completely broke down, as of July 9, 1926. There ensued a memorable period of chaos, lasting until after enactment of the Radio Act of 1927 on February 23, 1927, during which some 200 additional broadcast stations crowded their way into the already over-congested ether, while others changed frequency, increased power, and enlarged their hours of oper-

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In the Zenith Radio Corporation case, Judge Wilkerson suggested that, if construed to repose discretion in the Secretary, the Act would have to be held invalid for lack of any rule or standard. The above-cited cases and opinions are collected in Zollmann, *Cases on Air Law*, 1st ed., 1930.

[6] Radio Act of 1912, Sec. 4, next to last paragraph.

[7] See, in addition to cases cited in footnote 5, Tribune v. Oak Leaves Broadcasting Station, Cir. Ct., Cook County, Ill., Nov. 17, 1926, 68 Cong. Rec. 266, Zollmann's *Cases on Air Law*, 1st ed., p. 298.

[8] These conferences, usually referred to as the First, Second, Third and Fourth National Radio Conferences, are reported in Department of Commerce Radio Service Bulletin, No. 61, May 1, 1922; *Ibid*, No. 72, April 2, 1923, p. 9; Recommendations adopted by the Third National Radio Conference, 1924, Gov. Pr. Off.; Proceedings of the Fourth National Radio Conference, 1925, Gov. Pr. Off.

[9] 67 Cong. Rec. 5478-80, Mar. 12, 1926.

ation, at will. A bedlam of interference resulted, and, as stated in President Coolidge's message of Dec. 7, 1926, urging speedy enactment of legislation,

> "the whole source of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value." [10]

This situation was the immediate and compelling reason for enactment of the Radio Act of 1927.[11]

The legislative history of the Radio Act of 1927 does not, however, begin during the months immediately preceding its enactment. For a complete account reference must be had not only to the Radio Act of 1912, but also to a long series of bills, beginning in 1908, committee hearings and reports, and debates in Congress.[12]

The series reveals a gradual evolution. Later bills drew extensively on their predecessors and at the same time were gradually enlarged and moulded to meet new problems and broadening concepts as they developed. Committee hearings and debates in Congress constitute successive chapters in a continuous story.

For present purposes, the story may be considered to become important with the introduction by Mr. White (now Senator from Maine) of bills early in 1921, to amend the

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[10] 68 Cong. Rec. 32.

[11] See Stephen Davis (then Solicitor of the Department of Commerce), *Law of Radio Communication*, Chap. IV; Report of Standing Committee on Radio Law, A. B. A., 1929, 54 A. B. A. Rep. 439-443; General Electric Co. v. Federal Radio Commission, 1929, 58 App. D. C. 386, 31 F. (2d) 630; United States v. American Bond & Mortgage Co., N. D. Ill. E. D. 1929, 31 F. (2d) 448.

[12] John Nicholson, Radio Bills and Resolutions, 74 Cong. Rec. 7055, Mar. 3, 1931, later revised, 75 Cong. Rec. 15716, July 16, 1932, and published by Gov. Pr. Off. This is a substantially complete compilation of radio bills and resolutions introduced in Congress in the 58th to and including the first session of the 72d Congress, presenting their titles, by whom introduced, to what committee referred, and then subsequent legislative history including reference to debates.

Radio Act of 1912.[13] After committee hearings, a revised bill was reported, extensively debated, and (with amendments) passed by the House Jan. 31, 1923.[14] It died in the Senate Committee. This bill continued the Secretary of Commerce as the licensing authority, delegated to the Secretary extensive regulation-making power, and conferred upon him a wide discretion in granting and refusing applications for license, without providing any standard to control his discretion in either respect. It forbade any transfer of a license, or of any rights therein, without the consent in writing of the Secretary, and forbade the issuance of a license or the transfer of a license to aliens or alien-controlled corporations. The maximum license period was fixed at 10 years. No provision was made for hearing before the Secretary except in connection with revocation proceedings. No appeal to the courts was provided; this omission was vigorously criticized on the floor of the House and amendments were offered (but rejected) to cure it.[15] No commission was created but an advisory committee was established to whom the Secretary of Commerce would refer certain limited subjects for examination and report. An effort by amendment to authorize the advisory committee

> "to review any decision, order, rule or regulation made or issued by the Secretary of Commerce under the provisions of this act upon the written request so to do of any person, company, or corporation affected thereby,"

was rejected.[16] The bill also contained several sections aimed at preventing monopoly in radio communication,

[13] H. R. 4132, 67th Cong., introduced April 18, 1921, and H. R. 5889, introduced May 6, 1921. These bills were superseded by H. R. 13773, introduced Jan. 11, 1923.

[14] 64 Cong. Rec. 1617, 1865, 2328-55, 2781-98. The bill is reprinted in full at pp. 2328-30.

[15] 64 Cong. Rec. 2351-3, 2785-8, 2791, 2794-5.

[16] 64 Cong. Rec. 2794-5.

including the original form of what is now Sec. 311 of the Communications Act of 1934.[17]

The next important development was the passing by the Senate on April 7, 1924, of a bill introduced by Senator Howell of Nebraska on March 24, 1924.[18] This bill was very short. Under Sec. 1

> "the ether and the use thereof * * * is hereby reaffirmed to be the inalienable possession of the people of the United States and their Government, but privileges to enjoy such use may be granted as provided by law, for terms of not to exceed two years."

Sec. 3 required that applications set forth that

> "the claims of such licensee or applicant to the use of the ether are in consonance with and limited to the recitations and provisions of this act."

This bill reflected rising apprehensions that, due to defects in the Secretary's authority to limit the period of licenses under the Radio Act of 1912, vested rights might be created that could not be terminated or modified by the Government. In the House this bill was reported with an amendment by the committee but, at the committee's request, was re-referred to the committee where it died.[19] It is important in that it contributed to later bills, and ultimately to the Radio Act of 1927 and the Communications

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[17] This provision, together with Secs. 313 and 314, has a somewhat separate history, and is traceable to apprehension over monopoly in radio through control of patents, traffic agreements, merger of wire and radio, etc. See Report of the Federal Trade Commission on the Radio Industry, Dec. 1, 1923, in response to H. Res. 548, 67th Cong., Gov. Pr. Off., 1924. Of later origin but analogous purpose was the clause in Sec. 303(i) of the Communications Act giving the Commission power "to make special regulations applicable to radio stations engaged in chain broadcasting." 68 Cong. Rec. 2881, 3031, 3033.

[18] S. 2930, 68th Cong., 65 Cong. Rec. 4915, 5055, and 5733-7. The bill is set forth in full at p. 5735.

[19] 65 Cong. Rec. 5907, 8496; 66 Cong. Rec. 2361.

Act of 1934, the concepts which found expression in provisions asserting the purpose of Congress to maintain federal control over radio transmission and to limit the rights of licensees to the terms, conditions, and periods of their licenses, and requiring appropriate waivers by applicants and conditions in licenses.

Beginning in the 69th Congress, 1925-1927, the two streams largely converged but a new major point and several minor points of difference developed. In the House a series of bills were introduced,[20] extensive committee hearings were held, a bill was favorably reported and after extensive debate and with amendments, this bill was passed on March 15, 1926.[21] Contemporaneously, in the Senate a series of bills had been introduced and hearings had been held.[22] The bill passed by the House was referred to the Senate Committee and, on May 8, 1926, was reported with an amendment consisting of a deletion of the entire bill and a substitution of a new bill differing in many important respects but principally with respect to the character of the licensing authority. As thus amended, after extensive debate and with further amendments on the floor, the bill passed the Senate July 2, 1926.[23]

Because of the disagreement the bill went to conference. In the meantime, the breakdown of law enforcement occurred, followed by President Coolidge's appeal on Dec. 7, 1926, for speedy enactment of legislation. In the mean-

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[20] H. R. 5589, 9108 and 9971, introduced Dec. 15, 1925, Feb. 9, 1926, and Mar. 3, 1926, all by Mr. White of Maine. The latter is the bill which, with amendments, ultimately became the Radio Act of 1927.

[21] 67 Cong. Rec. 5473-5505, 5555-86, 5645, 5647; H. Rep. 464.

[22] S. 1, introduced Dec. 8, 1925, by Senator Howell, in substance the same bill as had been passed by the Senate during the preceding Congress; S. 1754, 4057 and 4156, introduced Dec. 16, 1925, April 22, 1926, and May 3, 1926, all by Senator Dill of Washington, and S. 3968, introduced April 13, 1926, by Senator Borah of Idaho.

[23] 67 Cong. Rec. 5688, 8960, 11436, 12000, 12230, 12335, 12480, 12497, 12614, 12617-8, 12630; S. Rep. 772.

time, to forestall the acquisition of vested rights in the continued operation of radio stations, and particularly in the use of any particular frequency or channel, a resolution was introduced in the Senate July 3, 1926, was debated in both Houses, and was passed Dec. 8, 1926.[24] It limited the license period for broadcast stations to 90 days and for other radio stations to two years, and required applicants to execute waivers to any right to any wave-length or to the use of the ether "because of previous license to use the same or because of the use thereof".[25]

The conference report was submitted on January 27, 1927,[26] and consisted in recommending the enactment of a compromise bill, somewhat of a patchwork drawing on both versions and inserting new provisions contained in neither. The conference report was extensively debated in both Houses,[27] and the bill was passed and approved Feb. 23, 1927.[28]

The major difference between the House and the Senate bills was summarized by the Conference Committee as follows:

> "* * * The House bill continued original jurisdiction over radio communication in the Department of Commerce, but set up a commission of five members to be appointed by the President and confirmed by the Senate to which the Secretary of Commerce was authorized to refer any matter, the determination of which was vested in him by the bill, and to which any

[24] S. J. Res. 125, introduced by Senator Dill. See 67 Cong. Rec. 12959, 13046, 13067.

[25] Increased belief in the need for such legislation was in part due to claims asserted in litigation in Chicago where one broadcast licensee had resorted to the state court for protection from interference from a "wave-jumper". Tribune v. Oak Leaves Broadcasting Station, Cir. Ct., Cook County, Ill., Nov. 17, 1926, 68 Cong. Rec. 266.

[26] H. Rep. 1886, S. Doc. 200.

[27] 68 Cong. Rec. 2556-80, 2750, 2869, 2882, 3025, 3037, 3117, 3123, 3244, 3257, 3329, 3431, 3569, 3589, 4027, 4109-13, 4148, 4155.

[28] 68 Cong. Rec. 2580, 4155, 4238, 4319, 4493, 4938.

person interested in or aggrieved by any decision of the Secretary might appeal. The Senate bill also created a commission, but gave to it original jurisdiction and complete control over radio regulation." [29]

The compromise arrived at, and incorporated in the Radio Act of 1927, was summarized by the Conference Committee as follows:

"Section 4 of the bill vests in the commission generally original jurisdiction over all radio stations. It gives to the commission much the same authority as was vested originally in the Secretary of Commerce by section 1 (B) of the House bill. The jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the commission by section 1 (C) of the Senate amendment. The important change from the provision of the Senate amendment is that while under the Senate bill this original jurisdiction was vested permanently in the commission, the jurisdiction is by this compromise as agreed upon limited to one year in time.

"Section 5 of the bill as agreed upon permits the Secretary of Commerce after one year to exercise all the original powers and authority vested in the commission by the preceding section except the power of revocation of licenses subject to reference, protest, and appeal to the commission. It provides that after one year's time the Secretary shall refer to the commission for its action applications for station licenses or for the renewal or modification of existing station licenses as to the granting of which controversy arises or against the granting of which protest is filed by any party in interest, and any application which the applicant himself requests be transferred to the commission. The section also authorizes the Secretary to refer to the commission any matter concerning which he has authority. It also provides for an appeal to the commission from any decision of the Secretary by any person aggrieved or whose interests are adversely affected thereby. In these instances the commission is to hear the matter so

[29] H. Rep. 1886, p. 16.

brought before it de novo and its decisions are to be final, subject to court review only.

"In addition to the powers conferred upon the Secretary of Commerce with respect to station licenses, section 5 vests in the Secretary of Commerce various administrative duties. The section also confers upon the Secretary control over station operators." [30]

Subsequent developments were to nullify the compromise arrangement and to give effect to the Senate's view. By acts enacted on Mar. 28, 1928, Mar. 4, 1929, and Dec. 18, 1929, the powers and authority vested in the Federal Radio Commission for the first year were continued first for limited periods and finally "until otherwise provided for by law".[31] By act approved June 30, 1932, provision was made for the transfer of the Radio Division of the Department of Commerce, together with its duties and functions, to the Federal Radio Commission.[32]

The Radio Act of 1927 was amended in other important respects. The second paragraph of Sec. 9 was amended Mar. 28, 1928,[33] so as to give definite and unequivocal directions to the Commission as to how to bring about the distribution of broadcast facilities among States and communities "so as to give fair, efficient, and equitable radio service to each of the same," as originally required by that paragraph. Sec. 16, governing appeals, was amended July 1, 1930 by substitution of a totally new section[34] hereinafter discussed.

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[30] *Ibid*, pp. 16-17.

[31] c. 263, 45 Stat. 373; c. 701, 45 Stat. 1559; c. 7, 46 Stat. 50.

[32] Act of June 30, 1932, Sec. 511, c. 314, 47 Stat. 417. The transfer became effective under executive order of the President July 20, 1932. On August 2, 1932, the Commission absorbed the Radio Division and designated it as the Division of Field Operations. 2 Jour. Radio Law, 752.

[33] c. 263, 45 Stat. 373.

[34] c. 788, 46 Stat. 844.

The major purposes of the Radio Act of 1927, in the light of its provisions and its legislative history, and evidenced over and over again in the debates, were

1. To confer an adequate delegation of legislative or regulation-making power on the licensing authority, largely for the prevention of interference, and to assure a maximum of efficient use of the ether under a standard (*e.g.*, public convenience, interest or necessity).

2. To confer adequate authority on the licensing authority to limit the number of persons engaged in radiocommunication, to choose persons for this purpose who were qualified (excluding alien interests and monopolies), and at the same time to assure adequate radio service (including, in the case of broadcasting), a fair and equitable distribution of broadcast facilities over the country, by applying a suitable standard (*e.g.*, public interest, convenience or necessity) to the granting and refusing of applications and to the fixing of terms and conditions in licenses, without exercising censorship over radiocommunications and without abridging freedom of speech.

3. To prevent the acquisition or assertion of vested rights in the continued operation of radio stations and particularly in the continued use of a frequency or wave-length, by specifying maximum license periods, by Congressional declarations of purpose, and by requirements of the execution of waivers by applicants and of the insertion of conditions in licenses.

4. To confer on all interested parties (including both applicants and parties aggrieved) a right of hearing before the licensing authority, and to confer on applicants and licensees subjected to revocation proceedings the right to judicial review (extended in 1930 to persons aggrieved by decisions of the licensing authority).

II. THE PROVISION GOVERNING APPEALS.

Sec. 402(b) to (f)[1] of the Communications Act of 1934 reproduces, almost *verbatim*, the provisions of the amended Sec. 16 of the Radio Act of 1927, approved July 1, 1930.[2] The only variations are immaterial to the issues of this case.[3]

For present purposes, the legislative history of the amended Sec. 16 of the Radio Act of 1927 is important. This legislative history covers (1) a scrutiny of Sec. 16 of the Radio Act of 1927 in its original form, together with pertinent facts in its history, (2) defects which developed in the operation of Sec. 16 in the period 1927-1930, (3) efforts made to correct those defects, resulting in the amendment of July 1, 1930, and (4) unsuccessful efforts in Congress to change the phraseology of the amended Sec. 16 during the period 1930-1934.

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[1] Reprinted in Petitioner's Brief, pp. 66-68.

[2] c. 788, 46 Stat. 844.

[3] The variations, other than minor matters of phraseology, are as follows:

1. Through oversight, the Act of July 1, 1930 omitted specifically to provide for an appeal in connection with Commission decisions granting or denying applications for construction permits. The circumstances explaining the oversight are recounted in 1 Jour. Radio Law 381-6. See Durham Life Ins. Co. v. Federal Radio Commission, 55 F. (2d) 537; Pacific Development Radio Co. v. Federal Radio Commission, 55 F. (2d) 540, in which the omission was supplied by judicial constructions.

2. The Act of July 1, 1930 provided for an appeal "by any licensee whose license is revoked, modified, or suspended by the commission" and "by any other person, firm, or corporation aggrieved or whose interests are adversely affected * * * by any decision of the commission revoking, modifying, or suspending any existing station license." Under the Communications Act of 1934 such licensees and persons must apparently resort to Sec. 402(a) for judicial review.

3. The Act of July 1, 1930 contains a proviso that it shall not relate to or affect pending appeals, omitted from the later statute.

(a) *Sec. 16 of the Radio Act of 1927 in its Original Form.*

Sec. 16 of the Radio Act of 1927[1] read as follows:

"Sec. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

"The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

"At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal."

[1] c. 169, Sec. 16, 44 Stat. 1169.

As pointed out in Part I of this review, "licensing authority" originally meant the Federal Radio Commission during the first year, and thereafter the Secretary of Commerce. Sec. 5, covering review of the Secretary's determinations by the Commission, discussed in more detail in Part III of this review, provided in part:

> "Decisions by the Commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given."

Study of the legislative history and antecedents of Sec. 16 reveals a continuous effort from the outset to obtain statutory provision for judicial review of the licensing authority's determinations.

In the first general bill on the subject of radio regulation, introduced Mar. 6, 1908, Sec. 4 provided in part:

> "* * * An appeal as to both law and fact from the order or decision of the Secretary of Commerce and Labor in any case involving the right of any person or corporation to obtain or retain a license shall lie to the circuit court of appeals of the jurisdiction in which such person resides or such corporation is formed, as in the case of other appeals to the said court from the circuit courts of the United States."[5]

Neither the bills which led directly to the Radio Act of 1912, nor the Act itself,[6] provided for any appeal. Although there is some reference to the danger of arbitrary power (with regard to the delegation of regulation-making power to the Secretary), we have been able to find nothing pertinent to the matter of appeals in the bills, the reports or the debates. Because of the omission in the Radio Act of 1912,

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[5] S. 5949, 60th Cong., introduced by Mr. Hale. The same provision appears in Sec. 4 of S. 7061, 61st Cong., introduced by Mr. Depew Mar. 10, 1910. These bills died in committee.

[6] The Radio Act of 1912 grew out of S. 6412, 62d Cong., which was a committee bill drawn from three other bills.

dissatisfied parties resorted to mandamus and other methods for obtaining judicial review.[7]

The next bill of general regulative scope with pertinent provisions was introduced Mar. 8, 1920.[8] It proposed a National Radio Commission. Sec. 28 of this bill provided:

> "Section 28. That orders of the National Radio Commission *granting* or denying applications for licenses for radio stations or radio operators, or revoking, suspending, modifying, or declaring void any licenses for such stations or operators previously granted, or imposing penalties for alleged violations of the provisions of this Act, may be reviewed on petition by any of the parties affected thereby to the Court of Appeals of the District of Columbia. Such petition shall be filed within thirty days from the date of the order of the National Radio Commission sought to be reviewed and a copy thereof shall forthwith be served upon the National Radio Commission. The National Radio Commission shall forthwith answer said petition setting forth the grounds upon which its order was based and shall file in the said court a transcript of the proceedings had before it; and thereupon the said court shall proceed expeditiously to hear and determine said petition and to affirm, set aside, or modify the order of the National Radio Commission and the order of said court shall be final. The said court shall have power by appropriate orders to regulate all matters of practice in connection with the review of such cases." (Italics supplied)

[7] Hoover v. Intercity Radio Co., 1923, 52 App. D. C. 339, 286 F. 1003; United States v. Zenith Radio Corporation, 1926, 12 F. (2d) 614; Carmichael v. Anderson, 1926, 14 F. (2d) 166; Tribune Co. v. Oak Leaves Broadcasting Station, 1926, 68 Cong. Rec. 266.

[8] 4038 66th Cong., by Mr. Poindexter. It died in committee. See Sen. Doc. 248, 66th Cong. Because of the World War during the intervening period, most of the legislation and proposed legislation had to do with Government operation of radio stations and the cessation thereof.

The parallel between the scope of appeal provided by the foregoing and that provided by the present law is striking.[9]

The bills passed respectively by the House and the Senate in 1923 and 1924 provided no right of appeal. In connection with the House bill,[10] however, amendments were offered to cure this omission and, although vigorously urged, were rejected. One of these proposed amendments was as follows:

> "The action of the Secretary of Commerce under this section or any other section of this act shall be subject to review by the courts at the instance of any interested party."[11]

Another was as follows:

> "*Provided*, That from any action of the Secretary of Commerce in refusing or revoking a license, the person whose license is revoked or refused shall have the right to appeal to a court of competent jurisdiction, which court shall have the power to confirm, modify, or reverse the decision of the Secretary, but the decision of the Secretary of Commerce shall not be suspended pending the decision of such court."[12]

A third would have given full power and authority to the advisory committee established by the bill to review any determination of the Secretary of Commerce upon the written request of any person "affected thereby".[13] In connection with the Senate bill,[14] the House Committee reported it with an amendment including an appeals provision as follows:

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[9] Mr. Poindexter introduced a substantially identical bill in the next Congress, S. 31, 67th Cong., April 12, 1921, but it also died in committee.

[10] H. R. 13773, 67th Cong.

[11] 64 Cong., Rec. 2351-3.

[12] 64 Cong. Rec. 2352, 2784-8, 2790-1.

[13] 64 Cong. Rec. 2784, 2794-5.

[14] S. 2930, 68th Cong.

> "Sec. 3. Any applicant for a permit or license whose application is refused by the Secretary of Commerce, and any holder of a license revoked by the Secretary of Commerce, shall have the right to appeal from such refusal or revocation to the Court of Appeals of the District of Columbia by filing with said court within twenty days after the decision complained of is rendered, notice in writing of said appeal and of the reasons therefor."

The committee report accompanying the amended bill stated in part:

> "The pending bill, therefore, seeks to give powers essential to these ends to the Secretary of Commerce, but it aims to prevent an arbitrary and unjust exercise of powers by definition of them and by providing in proper cases for an appeal to the Court of Appeals of the District of Columbia."[15]

There is nothing illuminating in the Senate debates on this bill, so far as appeals are concerned.[16]

The Fourth National Radio Conference, held November 9-11, 1925, included among its recommendations:

> "That the legislation shall contain provisions for due appeal from final decisions of the Secretary of Commerce to the appropriate court."[17]

In the 69th Congress, beginning in December, 1925, practically all the bills introduced and seriously considered contained provisions for appeals substantially like those of Section 16 as finally enacted, or sufficiently so as not to jus-

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[15] H. Rep. 719, 68th Cong., May 13, 1924.

[16] There was also introduced in the 68th Cong., H. R. 7357 by Mr. White on Feb. 28, 1924. Its provisions were identical with those of S. 2930 as amended by the House Committee, except in numbering and except for the fact it omitted the provision for appeal.

[17] 67 Cong. Rec. 549. See Proceedings of the Fourth National Radio Conference, Gov. Pr. Off., 1925, p. 35.

tify detailed exposition of the variations.[18] Only two provisions deserve particular mention. The appeal section of certain of the Senate bills also contained the following:

> "All other decisions of the Secretary of Commerce, or of the Radio Commission hereinafter established, shall be subject to the right of appeal by the party *aggrieved* to the district court of the United States for the district in which the appellant resides upon the same terms of procedure as hereinbefore provided for an appeal to the Court of Appeals of the District of Columbia."[19] (Italics supplied)

The House bill, as passed by the House, also contained the following:

> "Any person, firm, company, or corporation interested in or aggrieved by any decision of the commission with respect to the *granting* or refusal of a permit or license or the revocation of or the refusal to revoke a license, may appeal therefrom to the Court of Appeals of the District of Columbia. Notice of said appeal shall be given by service upon the secretary of said commission, prior to the filing thereof, of a certified copy of said appeal and the reasons therefor. Procedure upon said appeal shall be the same as in cases of appeal from decisions of the Secretary of Commerce."[20] (Italics supplied)

A strong minority committee report was filed by Mr. Davis of Tennessee in connection with the House bill on February 27, 1926.[21] While it was principally devoted to

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[18] See Sec. 2(H. of H. R. 9971, 69th Cong., as passed by the Senate July 2, 1926; Sec. 3 of H. R. 9971 as passed by the House Mar. 15, 1926; Sec. 3 of H. R. 9108 and Sec. 3 of H. R. 5589; Sec. 3 of S. 4156, and Sec. 10 of S. 1754. Most of the differences have to do with the identity of the licensing authority and the question whether appeals from orders of revocation should also lie to the district court in the district where the apparatus is operated.

[19] S. 1754 and S. 4057, 69th Cong.

[20] H. R. 9971, Sec. 8. See also Sec. 7 of H. R. 9108; Sec. 8 of H. R. 5589; Sec. 15 of S. 1754.

[21] H. Rep. 404, 69th Cong., 1st Sess., to accompany H. R. 9108.

arguing that the bill's provisions against monopoly were inadequate, it also criticized the provisions for review of the Secretary's decisions, saying:

> "Another important reason for the establishment of a commission of a quasi judicial nature is in order that it may speedily hear and determine appeals from the Secretary of Commerce. *During the consideration of legislation upon radio there has been a general demand that a right of appeal from the Secretary of Commerce should be accorded aggrieved parties,* and the Secretary of Commerce and the Solicitor of the Department of Commerce likewise took the position that such appeal should be granted. The pending bill provides for an appeal to the Court of Appeals of the District of Columbia by 'any applicant for a permit or license whose application is refused by the Secretary of Commerce and any holder of a license revoked by the Secretary of Commerce.' *However, the opportunity for a review of the decision of the Secretary of Commerce thus accorded is a shadowy one indeed.* The bill confers absolute authority and discretion upon the Secretary of Commerce to grant or refuse to grant licenses, to fix wave lengths and power to be used, to revoke licenses, etc. It is well settled that the courts will not reverse or alter the discretion of an administrative officer except in a clear case of abuse of discretion. * * *."[22] (Italics supplied)

After contending that the provisions for the proposed Commission were defective to meet the need, the minority report stated:

> "The pending bill recognizes the propriety of appeals from the action of the Secretary of Commerce. The commission should be in session prepared to speedily hear and determine such appeals. Not only should the interested parties have the right to present all competent evidence and arguments, but the commission should have a broad and full knowledge of the

[22] *Ibid*, pp. 19-20.

radio problem generally, in order to intelligently decide the individual cases appealed to them.[23]

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"I further suggest that *any person in interest feeling aggrieved* should have the right of appeal from the action of the commission to the Court of Appeals of the District of Columbia or some other Federal court, and that such court have the right of review of the questions of law, but that the finding of facts of the commission shall be conclusive."[24] (Italics supplied)

Otherwise, neither in the committee reports nor in the debates is anything stated by proponents of the bill regarding the construction to be given the appeals section on matters of interest to this discussion. There was considerable controversy over the question whether appeals from revocation orders should go to the Court of Appeals or to the district courts over the country[25] and in connection with the procedure (including appeals) where the applicant was charged with being a monopoly.[26] Mr. White described the appeals section as follows:

"* * * we have provided an appeal to the Court of Appeals of the District from decisions of Secretary or Commission in major matters."[27]

Mr. Davis offered amendments which carried out his minority views, including the following:

"Any person, firm, company, or corporation who feels aggrieved because of the refusal of the Secretary of Commerce to grant a permit or license, or to assign a satisfactory wave length, or *who feels aggrieved* because the Secretary of Commerce has granted a particular permit or license or wave length, or *who feels*

[23] *Ibid*, p. 22.
[24] *Ibid*, p. 23.
[25] 67 Cong. Rec. 5488, 5566-8, 5576-7.
[26] *Ibid*, 5504, 5557, 5561, 5564.
[27] 67 Cong. Rec. 5489.

aggrieved because of the revocation of a permit or license or the change of a wave length, or because of any other action or decision under the provisions of this act, shall have the right to appeal from such action of the Secretary of Commerce by filing with said commission, within 20 days after the decision or action complained of is effective, notice in writing of said appeal and the reasons therefor.

"The Secretary of Commerce shall be notified of such appeal by service upon him prior to the filing thereof of a copy of said appeal and of the reasons therefor.

"The case shall be heard de novo by the commission under regulations adopted by the commission for the hearing of such appeals, and the Secretary of Commerce and *all parties interested or aggrieved* shall be permitted to present any competent evidence. An appeal *by either party* shall lie from the decision of the commission to the Court of Appeals of the District of Columbia in the same manner as appeals are granted, perfected, and heard upon other decisions rendered by the commission."[28] (Italics supplied)

The bill as it passed the Senate contained no provision for appeal, the Senate committee having, by a divided vote, stricken out the House provision. An amendment restoring substantially the same language was, however, offered

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[28] 67 Cong. Rec. 5484. See also the amendment Mr. Davis proposed at p. 5485 to substitute for

"any person interested in or aggrieved by any decision of the Secretary of Commerce"

the following:

"Any person, firm, company, corporation or municipal corporation *interested in, aggrieved, or in any way affected* or *inconvenienced* by any decision of the Secretary of Commerce with respect to the granting or refusal of a permit or license or the revocation or refusal to revoke a license." (Italics supplied)

The substance of this amendment appeared in the bill as it passed the House.

and adopted on the floor of the Senate.[29] This was not without opposition.[30]

Neither the Conference reports nor the debates thereon contain anything of interest on the subject.[31]

(b) *Defects in the Operation of Sec. 16.*

For over a year and a half after the establishment of the Federal Radio Commission, no appeals from its decisions were heard or determined,[32] and no particular attention was attracted to its defects. With the fall of 1928 and the early winter of 1929, however, a series of appeals demonstrated its inadequacies in that (1) it conferred the right of appeal only on applicants whose applications had been denied, but not on others whose rights might be adversely affected by the *granting* of another's application, and (2) review by the Supreme Court was excluded by the fact that the Court of Appeals acted in a superior administrative and not a judicial capacity in reviewing decisions of the Commission.[33] These defects were repeatedly called to the attention of Congress and were the subject of widespread comment and criticism.

In a report on needed amendments made to the House Committee on Merchant Marine and Fisheries, which then had proposed radio legislation under consideration, the general counsel of the Commission stated:

> "Unfortunately, however, Section 16 is so worded as to provide for an appeal only from decisions of the

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[29] 67 Cong. Rec. 12354, 12507-8.

[30] 67 Cong. Rec. 12354-5.

[31] 68 Cong. Rec. 2750-4148. See pp. 2563, 2565, 2566, 2579, 2869, 3029.

[32] Prior to the fall of 1928, five appeals were taken to the United States Court of Appeals for the District of Columbia, but all were voluntarily dismissed. 1 Jour. Radio Law, 102. Report of Standing Committee on Radio Law, A. B. A., 54 A. B. A. Rep. 462.

[33] Federal Radio Commission v. General Electric Co., 281 U. S. 464.

licensing authority refusing certain kinds of applications. * * * This section makes no provision for appeal by anyone except parties whose applications have been denied." [34]

The same general counsel (after resignation from office) later presented the need for amendment before the Senate Committee on Interstate Commerce, which likewise had proposed radio (and communications) legislation under consideration, in part as follows:

"It [Sec. 16] does not provide an appeal for anyone but the defeated applicant. It is almost impossible, particularly in the broadcast band, to have a decision in favor of the applicant which does not affect someone else than the applicant. * * * The Commission is regularly giving such a station a right to participate in the hearing although the statute does not require it. * * * But he does not have any standing on appeal if his wave length is taken away from him and given to the applicant station." [35]

In the Report of the Standing Committee on Radio Law of the American Bar Association, 1929, it was stated:

"In no respect is the Radio Act of 1927 more unsatisfactory than in the appellate procedure provided.

"Section 16 gives the right of appeal only to applicants whose applications * * * have been *denied* by the Commission * * *. No right of appeal is given to a licensee whose rights under an existing license or construction permit may be vitally injured or destroyed by the granting of another's application."

After discussing the situations presented by several pending appeals, the Committee stated:

"No better demonstration of the inadequacy of the appeal provisions of the Radio Act of 1927 could be found than the situation raised by these appeals." [36]

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[34] United States Daily, Jan. 18, 1929.

[35] Hearings on S. 6, 71st Cong. 1st Sess., p. 149, May 11, 1929.

[36] 54 A. B. A. Rep. 461, 468.

The committee recommended, among other things, that Sec. 16

> "be amended to give interested respondents the same right of appeal and to participate in appeals as unsuccessful applicants now have."

and, at its annual meeting that year, the American Bar Association approved this recommendation, together with others.[37] The committee which thereafter was called the Standing Committee on Communications, continued to urge this amendment in its report the next year.[38]

The appeals actually taken during this period presented a variety of anomalous situations in which, by one device or another, parties adversely affected by the Commission's *granting* of another's application, or who would be adversely affected if the reviewing court should reverse a commission decision denying another's application, sought to participate in the proceedings on appeal.[39] In some cases the Court of Appeals permitted actual participation in the filing of briefs and argument by such interested parties, admitted as *amici curiae*. In certain of the cases it was being contended in the Court of Appeals that, if Sec. 16 were construed to give the Court of Appeals power to render a judgment adversely affecting any person other than the immediate parties, i.e., the appellant and the Commission, it was

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[37] 54 A. B. A. Rep. 477, 89-90.

[38] 55 A. B. A. Rep. 393.

[39] See the appeal taken by the State of New York along with that of the General Electric Co, General Electric Co. v. Federal Radio Commission, 1929, 31 F. (2d) 630; Great Lakes Broadcasting Co. v. Commission and Agricultural Broadcasting Co. v. Commission, 1929, 37 F. (2d) 993; Chicago Federation of Labor v. Commission, 1930, 41 F. (2d) 422; the Short-Wave Appeals (four cases), 1931, 46 F. (2d) 602; Journal Co. v. Commission (four appeals), 1931, 48 F. (2d) 461. Most of these situations are described and commented on in Appeals from Decisions of the Federal Radio Commission, 1 Jour. Air Law 274.

invalid.[40] Sec. 16 was amended before it became necessary for the Court to pass on this contention.

The most significant case was, perhaps, Journal Company v. Commission,[41] in which the Journal Company, licensee of an existing station in Milwaukee, was, without notice or opportunity for hearing, subjected to increased interference and a substantially reduced service area through Commission action shifting stations on the same frequency in Florida. The Journal Company first appealed prior to July 1, 1930, contending that

> "by an increase in power to another station already assigned to the channel, the commission had in effect refused appellant's application for renewal."[42]

The Court of Appeals dismissed this appeal, saying:

> "Appellant was prejudiced, not by a refusal to renew its application, but by the commission's action with respect to other stations. Under the Act of 1927 no appeal was allowed in such circumstances. Recognizing this apparent defect in the statute, Congress, in the Act of July 1, 1930 (46 Stat. 844 [47 U. S. C. A. § 96]), amending section 16 of the 1927 Act, provided for appeals by 'any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.'"

After amendment of Sec. 16, the Journal Company took further appeals, as a person "aggrieved or whose interests are adversely affected," and on these appeals, the Court reversed the Commission.

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[40] The Short-Wave Appeals, 1931, Nos. 4987-91. See 1 Jour. Air Law 280.

[41] 1931, 48 F. (2d) 461.

[42] *Ibid.* p. 463.

(c) *Legislative History of Act of July 1, 1930,*[43] *Amending Sec. 16 of the Radio Act of 1927.*

On Mar. 4, 1930, a bill was introduced in the House by Mr. White of Maine to remedy various procedural and other defects in the Radio Act of 1927.[44] After consideration of this bill in committee, a revised bill[45] was introduced by Mr. White, and on April 30, 1930, after debate and amendment, was passed by the House.[46] Both bills contained an amendment of Sec. 16 substantially in the form it ultimately became law. In the Senate the bill was referred, on May 1, 1930, to the Senate Committee on Interstate Commerce, from which it did not emerge until Feb. 11, 1931, when it was reported with an "amendment" consisting of a complete revision. Its later history is unimportant since it never became law.[47]

On May 12, 1930, a joint resolution was introduced in the Senate[48] to transfer the functions of the Radio Division of the Department of Commerce to the Federal Radio Commission, and was passed by the Senate May 22, 1930.[49] On May 24, 1930, the House Committee on Merchant Marine and Fisheries reported the joint resolution with an amendment consisting of adding the proposed new Sec. 16.[50] Because of vigorous opposition to the original contents of the joint resolution, objection prevented its consideration on the unanimous consent calendar.

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[43] c. 788, 46 Stat. 844.

[44] H. R. 10473, 71st Cong.

[45] H. R. 11635, 71st Cong., introduced Apr. 14, 1930.

[46] 72 Cong. Rec. 7051, 7099, 8049, 8055; H. Rep. 1179.

[47] At the close of the 71st Congress on Mar. 4, 1931, after having been passed by the Senate with amendments and conferees having been appointed, the bill was still lying on the Speaker's table in the House.

[48] S. J. Res. 176, 71st Cong.

[49] 72 Cong. Rec. 8711, 9190, 9356; S. Rep. 694.

[50] 72 Cong. Rec. 9485, 9520, 11523-4; H. Rep. 1633.

On May 24, 1930, Mr. Lehlbach of New Jersey introduced a bill[51] consisting solely of the new Sec. 16. This bill was reported favorably, debated, amended, and passed the House.[52] Likewise in the Senate it was reported favorably, and was passed, becoming law July 1, 1930.[53]

As shown by the foregoing, the legislative history of the amended Sec. 16 extended back through several bills and the committee hearings held thereon. It was the one amendment to the Radio Act of 1927 which everyone agreed was vitally necessary. In addition, the Senate Committee on Interstate Commerce had been holding extensive hearings from May 8, 1929, to June 7, 1929, and from Dec. 4, 1929, to Feb. 26, 1930, in connection with a bill to establish a commission on communication in the course of which the need for amending Sec. 16 had been brought to the Committee's attention.[54]

In the course of the debate on the bill passed by the House on April 30, 1930, Mr. Davis of Tennessee stated:

> "*Mr. Davis*: These changes are practically all of a procedural and administrative character. As has been explained by the gentleman from New Jersey, the two outstanding changes are those relating to the hearings before the commission and those relating to appeals from the commission to the courts. The act of 1927 was perhaps not comprehensive and definite enough in these particulars. At any rate, differences of opinion arose as to the proper interpretation of the law, both with respect to hearings and the right of parties thereto and also in respect to appeals, and interpretations have been made that were not in accord with the purpose and views of the committee which reported the original bill.

[51] H. R. 12599, 71st Cong.; unfortunately, it followed the language of H. R. 10473 instead of H. R. 11635, and, through oversight, mention of applications for construction permits was omitted.

[52] 72 Cong. Rec. 9521, 9694, 11524, 11529; H. Rep. 1665.

[53] 72 Cong. Rec. 11553, 11749, 11881, 11956, 11958, 12019, 12510.

[54] Hearings on S. 6, 71st Cong. See preceding sub-heading.

"With respect to the subject of hearings, the amendments proposed make it very clear and definite how the hearings shall be held, *and insure any interested party the right to be heard. The same is true with respect to the right of appeal to the courts. Any party aggrieved* is given the right to appeal to the court; and then we have made it clear in the proposed amendment that an appeal shall lie to the Supreme Court of the United States upon a proper showing by petition for a writ of certiorari."[55] (Italics supplied)

Again, in connection with the bill which became law July 1, 1930, Mr. Davis stated:

"*Mr. Davis*: Mr. Speaker and Members of the House, I am much gratified by the passage of this bill to amend—in fact, rewrite—the appeal section of the present radio act. It is not only in the interest of the public, but in the interest of orderly procedure. I never did like the language of section 16 of the radio act. When the bill culminating in that act was being considered, I criticized the appeal provision both in the committee and in the House. I insisted that the provision was ambiguous and would prove unsatisfactory and ineffective. In my minority views filed on said bill in the Sixty-ninth Congress, in discussing the appeal provision, which the bill we have just passed supplants, I declared that the 'opportunity for a review is a shadowy one, indeed'.

"In suggesting a number of amendments to the pending bill in said minority views, I stated with respect to the appeal provision:

"'I further suggest that any person in interest feeling aggrieved should have the right of appeal from the action of the commission to the Court of Appeals of the District of Columbia or some other Federal court, and that such court have the right of review of the questions at law, but that the findings of fact of the commission shall be conclusive.'"[56]

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[55] 72 Cong. Rec. 8052, April 30, 1930.

[56] 72 Cong. Rec. 11530, June 23, 1930. Mr. Davis' reference to his minority views is to his minority report on H. R. 9108, H. Rep. 404, 69th Cong., 1st Sess., pp. 20, 22, 23, Feb. 27, 1926.

The only other references to the amended Sec. 16 in the debates do not have to do with the question under consideration.[57]

(d) *Further Efforts to Amend Sec. 16 of the Radio Act of 1927.*

Some helpful information can be obtained from efforts made further to amend Sec. 16 during the period 1930-1934.

In the 72nd Congress Mr. Davis introduced a bill[58] somewhat similar to the bill introduced in the preceding Congress,[59] covering a number of changes, both procedural and substantive, in the Radio Act of 1927. It carried an elaborate new appeal section with a number of changes, some of which are not pertinent to this review. It provided for an appeal from any commission decision or order "granting or denying, in whole or in part" the several kinds of applications (including construction permits), and that the appeal might

> "be taken by any party to the proceeding in which the order was made, whether an applicant, licensee, permittee, or intervenor, except that, in case of a decision or order revoking or suspending a station license, the appeal may be taken by the licensee only."

It also provided that

> "any party to the proceeding before the commission may join in the appeal or appear as a party respondent by filing with the court" etc.

and that

> "any person may at any time be made a party to the proceedings by the court if, in the opinion of the court,

[57] 72 Cong. Rec. 8052, statement of Mr. Lehlbach of New Jersey.
[58] H. R. 7716.
[59] H. R. 11635, 71st Cong., discussed under previous subheading.

his presence is necessary or proper to a complete determination of the case."

The bill passed the House February 10, 1932.

In the Senate, a new and even more elaborate Section 16 was inserted in the bill, preserving, however, a great deal of the House bill's phraseology. The right to appeal was extended to the same list of parties but qualified by the clause "who is aggrieved by said order". The right of any party to the proceeding to join in the appeal or appear therein as respondent was made contingent

> "upon a showing of interest in the subject-matter and reasonable cause for failure to appear before the commission".

It was further provided that

> "The court shall not have power to make any order or enter any judgment affecting any substantial interest of any person who has not appeared or been made a party to the proceedings upon said appeal".

The bill passed the Senate February 10, 1933.[60] A conference report was agreed to but the bill never became law because of a pocket veto by the President.

Nothing of particular significance is to be found in the House or Senate committee reports, or in the debates in the House, although during the latter a number of other aspects of the appeal section were discussed.[61] In the Senate debates, Senator White had the following to say:

> "This appeal section has been scrapped in its entirety and a new and what I consider novel appeal section has been substituted for it. The new section pro-

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[60] 76 Cong. Rec. 3770.

[61] 75 Cong. Rec. 3680-3705; H. Rep. 221, Jan. 21, 1932; S. Rep. 564, Apr. 14, 1932. In the House Committee Report (p. 7) it was stated

> "All the provisions in the bill have been considered by the Federal Radio Commission and its counsel, and have their approval and recommendation."

vides generally for appeal to the Court of Appeals of the District of Columbia.

* * * * * * * * *

"Paragraph (a) of section 16 as proposed to be amended designates and limits the parties who may appeal. They are an applicant, a licensee, a permittee, or intervenor. No one else may appeal from a decision of the Radio Commission, but there is nothing in the law which says who may be a permittee, who may be an intervenor, or how a person may become either a permittee or intervenor in a proceeding before the Federal Radio Commission. *But whatever it means, it is a limitation upon the present right of appeal, for the present right of appeal is among others to any person adversely affected by a decision of the Federal Radio Commission. So here we have a section limiting the right of appeal from that granted by present law.*

"Because of the peculiar characteristics of radio, because of the fact that a controversy may arise in the State of Missouri and that controversy may involve a station in West Virginia or Maine or Indiana or California, I think it unwise in the extreme to limit, as is here proposed to be done, this right of appeal. I think the right of appeal should be in *any person adversely affected or aggrieved* by a decision of the Federal Radio Commission."[62] (Italics supplied)

In 1934, in the course of the hearings on the bill that eventually became the Communications Act of 1934, the Federal Radio Commission, through its chairman, made a concerted effort to have Congress *restrict* the right of appeal to (1) any applicant for renewal of license whose application is refused by the Commission, and (2) any licensee whose license is revoked by the Commission. The reason advanced was that in such cases "the right to existence of a radio station is involved", whereas in other

[62] 76 Cong. Rec. 5208, Feb. 28, 1933. See also Senator White's criticisms of the proposed appeals section in the Hearings on H. R. 7716 before the Senate Committee on Interstate Commerce, Mar. 11-12, 1932, pp. 9, 21, and Dec. 22, 1932, p. 49.

cases it is not.[63] Both the House and the Senate Committees rejected the suggestion.[64]

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[63] Hearings on H. R. 8301, 73rd Cong., before House Committee on Interstate and Foreign Commerce, Apr. 11, 1934, p. 80; Hearings on S. 2910, 73rd Cong., before Senate Committee on Interstate Commerce, Mar. 9, 1934, pp. 43-4.

[64] On Apr. 19, 1934 the Senate Committee reported S. 3285 (succeeding the original S. 2910) but did not adopt the Commission's recommendation (S. Rep. 781) and S. 3285, providing a full right of appeal, passed the Senate May 15, 1934. On June 1, 1934 the House Committee reported a substitute for S. 3285, in which Sec. 16, as amended July 1, 1930, was reenacted. As the result of a conference, Sec. 402(b) to (f) emerged in its present form (Conference Rep. 1918, 73rd Cong., June 9, 1934).

III. THE PROVISION GOVERNING HEARINGS BEFORE THE COMMISSION ON APPLICATIONS.

Section 309(a) of the Communications Act of 1934[1] reproduces, practically *verbatim*, the first paragraph of Section 11 of the Radio Act of 1927 as originally enacted.[2] The latter reads as follows:

> "Sec. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.
>
> * * * * *"

The legislative history of this provision will be reviewed solely in the light of the issues in this case. There are, however, other provisions of the Communications Act which must be taken into account, particularly Sections 303(f), 310(b), 312(a) and (b), 319(a) and (b), and 405.[3]

(a) *Sec. 11 of the Radio Act of 1927.*

The first paragraph of Section 11 of the Radio Act of 1927 was the product of the Conference Committee, and, with one exception, neither it nor any counterpart appeared in any of the bills introduced either in that or in prior Con-

[1] Reprinted in the Appendix to Petitioner's Brief, pp. 59-60.

[2] The only difference is the substitution of "Commission" for "licensing authority".

[3] These are all reprinted in the Appendix to Petitioner's Brief.

gresses.[4] The reason for this, and for what seemingly is an unnecessary repetition of language as between the opening portions of Sections 11 and 9[5], is not difficult to ascertain.

The series of bills in the House and Senate which resulted in the Radio Act of 1927 all contain provisions corresponding to the first two paragraphs of Section 9 of that Act, of which the following is typical;

"Sec. 2. • • •

• • • • •

"(C) The Secretary of Commerce, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, may grant to any applicant therefor a station license provided for in sections 1 and 2 hereof.

"In considering applications for licenses and renewals of licenses, when and in so far as there is a

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[4] The one exception was Senator Borah's bill, S. 3968, 69th Cong., introduced April 13, 1926, which read in part:

"Sec. 10. • • •

• • • • •

"(d) Upon the refusal to issue any license or permit and upon the suspension or revocation of any license or permit by the Commission under this Act, the commission shall make an order to such effect and give notice thereof to the applicant or holder. Within thirty days after such notice the applicant or holder may file a written request with the commission for a public hearing upon such order. The Commission upon receipt of the request shall forthwith arrange for a public hearing • • •.

• • • • •

"The refusal, suspension, or revocation of the license or permit shall be invalid unless opportunity for hearing is afforded, notice served or sent, and decision rendered within the respective times prescribed by this subdivision.

"(e) The decision of the commission may be reviewed by the Court of Appeals of the District of Columbia if petition for such review is filed by the applicant or holder within ninety days after the decision is rendered."

[5] Carried forward into Sec. 307(a) of the Communications Act of 1934, reprinted in the Appendix to Petitioner's Brief, pp. 58-59.

demand for the same, the Secretary of Commerce shall make an equitable distribution of licenses, bands of frequency or wave lengths, and of power among the different zones established in section 9 of this Act, and shall apply the same principle, as between applicants from the different States and communities within each of said zones.

* * * * *"[1]

All of them, furthermore, follow substantially the same arrangement in the subject-matter of the succeeding provisions, corresponding to the remainder of Section 9, Section 10, the *second* paragraph of Section 11, etc.

The omission in these bills of anything corresponding to the first paragraph of Section 11 was *not* due to an intention to deprive interested parties of an opportunity for a full administrative hearing but rather that other portions of the bill provided for such a hearing.

In the series of House Bills, it will be recalled, the Secretary of Commerce was to be made the permanent licensing authority, and the Commission was to be established with jurisdiction as follows:

"Sec. 8. * * *

* * * * *

"The Secretary of Commerce may refer to the commission any applications for licenses or for the use of wave lengths or for power in connection therewith, or any other matter, the determination of which is vested in him under the terms of this Act. Any person, firm, company, or corporation interested in or aggrieved by any decision of the Secretary of Commerce may appeal therefrom to the commission. The commission shall hear appeals or references by the Secretary of Commerce de novo, and is authorized to adopt general rules and regulations fixing the time and form of appeals and governing the proceedings before it. Any person, firm, company, or corporation interested in or aggrieved by any decision of the commission with re-

[1] Sec. 2(C) of H. R. 9971, 69th Cong., as passed by the House Mar. 15, 1926.

spect to the granting or refusal of a permit or license or the revocation of or the refusal to revoke a license, may appeal therefrom to the Court of Appeals of the District of Columbia. Notice of said appeal shall be given by service upon the secretary of said commission, prior to the filing thereof, of a certified copy of said appeal and the reasons therefor. Procedure upon said appeal shall be the same as in cases of appeal from decisions of the Secretary of Commerce.

* * * * *"[7]

Under the compromise arrived at in conference, the Commission was to be the licensing authority for the first year and thereafter the Secretary of Commerce, with the Commission exercising the appellate or supervisory jurisdiction which the House bill had provided. As a result, in order to bridge the gap and to provide for hearing before the Commission during the first year, it was necessary to insert Section 11. It can hardly be contended that Congress intended to require less in the way of notice and opportunity for hearing for interested parties during the first year than thereafter.

It is more reasonable to assume that Section 11 was intended to afford an opportunity for hearing equivalent to that provided by Section 5 *after* the end of the first year. The relevant provisions of Section 5 of the Radio Act of 1927 were as follows:

"Sec. 5. From and after one year after the first meeting of the commission created by this Act, all the powers and authority vested in the commission under the terms of this Act, except as to the revocation of licenses, shall be vested in and exercised by the Secretary of Commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

"It shall also be the duty of the Secretary of Commerce—

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[7] Sec. 8 of H. R. 9971, 69th Cong., as it passed the House Mar. 15, 1926. Similar but less elaborate provisions appeared in Sec. 8 of H. R. 5589 and Sec. 9 of H. R. 9108; also Sec. 15 of S. 1754.

"(A) For and during a period of one year from the first meeting of the commission created by this Act, to immediately refer to the commission all applications for station licenses or for the renewal or modification of existing station licenses.

"(B) From and after one year from the first meeting of the commission created by this Act, to refer to the commission for its action any application for a station license or for the renewal or modification of any existing station license as to the granting of which dispute, controversy, or conflict arises or against the granting of which protest is filed within ten days after the date of filing said application by any party in interest and any application as to which such reference is requested by the applicant at the time of filing said application.

* * * * *

"(F) To report to the commission from time to time any violations of this Act, the rules, regulations, or orders of the commission, or of the terms or conditions of any license.

* * * * *

"(H) * * *

"The Secretary may refer to the commission at any time any matter the determination of which is vested in him by the terms of this Act.

"Any person, firm, company, or corporation, any State or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce may appeal therefrom to the commission by filing with the Secretary of Commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation. All papers, documents, and other records pertaining to such application on file with the Secretary shall thereupon be transferred by him to the commission. The commission shall hear such appeal de novo under such rules and regulations as it may determine.

"Decisions by the commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given.

* * * * *"

The powers and functions of the Secretary of Commerce were transferred to and vested in the Commission under Act of Congress, June 30, 1932 and an executive order of the President pursuant thereto.[8]

The antecedents of the above-quoted portion of Section 5 of the Radio Act of 1927 have already been sufficiently adverted to under the preceding heading. They reflect a persistent desire in Congress that opportunity for full administrative hearing be accorded not only to applicants but to persons "aggrieved or whose interests are adversely affected."

(b) *Sec. 319 of the Communications Act of 1934.*

Sec. 319 of the Communications Act of 1934, covering construction permits, is a substantial reproduction of Sec. 21 of the Radio Act of 1927. Petitioner's brief directs attention to the fact that this section does not, in terms, require any hearing whereas Sec. 309(a), requiring hearing under certain circumstances, does not mention applications for construction permit. The question is raised as to whether applications for construction permit are to be considered as included within the applications as to which hearing is required by Sec. 319.

The antecedents of Sec. 21 of the Radio Act of 1927 go back to the earlier bills[9] but none of them throws any light on the question.

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[8] c. 314, Sec. 511, 47 Stat. 417.

[9] The forerunner of the construction permit appears to have been the provision in Senator Poindexter's bill, S. 4038, 66th Cong., introduced Mar. 8, 1920, in which Sec. 5 provided in part:

> "• • • In case of stations not actually under construction or already constructed at the date of the passage of this Act, the license or licenses must be secured before the commencement of the construction of such stations. • •"

Practically all bills thereafter make an express requirement of construction permits issued upon application.

The reason for the omission of any requirement for hearing in Sec. 21 of the Radio Act of 1927, or in any of the bills leading to its enactment, is probably to be found in the circumstances recounted under the previous subheading. The provisions in the House bills which became Sec. 5 of the Act adequately provided for full administrative hearing for all interested parties, including both applicants and persons adversely affected. In drafting the compromise bill, the Conference Committee inserted Sec. 11 but either overlooked the construction permit section (which was located elsewhere in the House bill) or considered that, in view of the provisions of that section, an application for construction permit was in effect an application for license.[10] In view of the fact that Sec. 21 makes the issuance of a license almost automatic once a construction permit has been issued and its terms have been complied with, it and Sec. 11 can hardly be read together intelligibly on any other basis.

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[10] This was the view taken, in substance, by the United States Court of Appeals in Durham Life Ins. Co. v. Commission, 55 F. (2d) 537 and Pacific Radio Development Co. v. Commission, 55 F. (2d) 540, both decided Dec. 21, 1931.

IV. THE STANDARD "PUBLIC INTEREST, CONVENIENCE OR NECESSITY."

The standard "public interest, convenience or necessity", or its equivalent, appears in the following portions of the Communications Act of 1934:

1) Sec. 309(a),[1] having to do with the disposition of applications for license, for renewal of license, and for modification of license. Except for substitution of "Commission" for "licensing authority", this section is identical with the first paragraph of Sec. 11 of the Radio Act of 1927.

2) Sec. 319,[2] having to do with the disposition of applications for construction permit. This section is similarly identical with Sec. 21 of the Radio Act of 1927.

3) Sec. 307(a),[3] having to do with the granting of station licenses. This section is similarly identical with the first paragraph of Sec. 9 of the Radio Act of 1927.

4) The opening clause of Sec. 303,[4] governing the exercise of the Commission's principal legislative or regulation-making powers. This section is similarly identical with the opening clause of Sec. 4 of the Radio Act of 1927.

5) Sec. 303(f),[5] having to do with making regulations to prevent interference "and to carry out the provisions of the Act." This clause varies from Sec.

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[1] "that public interest, convenience or necessity would be served".

[2] "if public convenience, interest, or necessity would be served."

[3] "if public convenience, interest, or necessity will be served."

[4] "as public convenience, interest, or necessity requires".

[5] "will promote public convenience or interest or will serve public necessity".

4(f) of the Radio Act of 1927 by substituting "after a public hearing the Commission shall determine that" for "in the judgment of the commission."

6) Sec. 310(b),[6] having to do with the Commission's consent to transfer of licenses. This section represents a substantial modification of the second paragraph of Sec. 12 of the Radio Act of 1927. The earlier statute did not contain any standard. The later statute expands its scope to include transfers of control in licensee corporations, and forbids any transfer "unless the Commission shall, after securing full information, decide that said transfer is in the public interest."

7) Sec. 310(b),[7] governing compulsory modification of license. This section had no counterpart in the Radio Act of 1927.

8) Sec. 325(c),[8] having to do with permits to export programs to be broadcast by foreign stations. This section had no counterpart in the Radio Act of 1927.

It is unnecessary, for present purposes, to trace the legislative history of the standard as used in the above-enumerated sections separately for each section. The standard was introduced in 1934 into Sec. 310(b), although not contained in the corresponding portion of the Radio Act of 1927, for obvious reasons, *i.e.*, to provide a guide for the Commission's determinations on proposed transfers, and to subject a proposed transferee of a license to the same test as is imposed on an applicant for a new station. Secs.

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[6] "in the public interest".

[7] "will promote public interest, convenience, and necessity".

[8] "shall be subject to the requirements of section 309". The section further makes a permit subject to revocation when the Commission finds "its continuation no longer in the public interest".

310(b) and 325(c), which had no counterpart in the Radio Act of 1927, were, logically enough, endowed with the same standard as had been made applicable to the Commission's other determinations.

The significant field for study is, therefore, the history of the standard as it appeared in Secs. 4, 9, 11 and 21 of the Radio Act of 1927.

1. ORIGIN OF THE STANDARD AS USED IN THE RADIO ACT OF 1927.

As already explained, Sec. 11 of the Radio Act of 1927 originated in the conference report of January 27, 1927 proposing a compromise between H.R. 9971 as it passed the House March 15, 1926 and H.R. 9971 as it passed the Senate July 2, 1926. Our search is, therefore, confined to Secs. 4, 9, and 11 of the Act.

Except for differences in the numbering of sections and location in the bills, these three sections had counterparts in almost all of the bills introduced in either House or Senate in the 69th Congress, and in each instance the same standard appears.[9]

On the other hand, the bill passed by the House on January 31, 1923,[10] while containing sections otherwise corre-

[9] H. R. 5589, introduced Dec. 15, 1925, Secs. 1(B), 2(C) and 7; H. R. 9108, introduced Feb. 9, 1926, Secs. 1(B), 2(C) and 8; H. R. 9971, as passed by the House, Mar. 15, 1926, Secs. 1(B), 2(C) and 7; H. R. 9971 as passed by the Senate July 2, 1926, Secs. 1(C) and 2(C), the construction permit section being omitted; and S. 4057, introduced Apr. 22, 1926, Secs. 1(D), 2(C) and 7. S. 1754: introduced by Senator Dill Dec. 16, 1925, used the same phraseology in Sec. 2 (corresponding to Sec. 4 of the Radio Act of 1927) but in Sec. 6 (corresponding to Sec. 9 of the Radio Act of 1927) provided:

> "The Secretary of Commerce may * * * grant licenses * * * to any applicant who will render a public benefit, is needed by the public interest, or is contributing, or will contribute to the development of the art of radio."

Instead of construction permits, Sec. 12 of S. 1754 provided for preliminary licenses.

[10] H. R. 13773, 67th Cong., Secs. 1(B), 2(C) and 4.

sponding to Secs. 4, 9 and 21 of the Radio Act of 1927, omitted any standard. Similarly, the bill which passed the Senate April 7, 1924,[11] did not have any such provisions and did not make use of the standard.

Use of the standard, or of its forerunners, in radio legislation had, however, a much earlier origin.

The first general bill to regulate radio communication, introduced March 6, 1908 made licenses for operation or use of wireless telegraph apparatus subject to the

> "condition that the said operation or use thereof shall not interfere with any naval or military wireless telegraph station."[12]

Substantially the same bill was again introduced in the next Congress.[13]

Recitations in other bills and resolutions introduced during this same period depict the problem in its early aspects and contain a germ of the standard later to become part of the law:

> "Whereas the unrestricted use of wireless telegraphy and wireless telephony has reached such a state that the transmission of public and private messages, including calls from vessels in distress, have been interfered with *to the detriment of public and private interests;* * * *";[14] (Italics supplied)

> "Whereas the unrestricted use of wireless telegraphy and wireless telephony has reached such a state that official messages involving the saving of life and property are frequently interfered with, *to the jeopardy and detriment of the public interests* * * *;"[15] (Italics supplied)

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[11] S. 2930, 68th Cong.

[12] Sec. 4 of S. 5949, 60th Cong., introduced by Mr. Hale.

[13] Sec. 4 of S. 7061, 61st Cong., introduced by Mr. Depew, Mar. 10, 1910.

[14] The above is contained in H. R. 19560, 61st Cong., introduced Jan. 27, 1910, and H. R. 22558, 61st Cong., introduced Mar. 8, 1910, both by Mr. Burke.

[15] H. J. Res. 95, introduced Dec. 17, 1909, and H. J. Res. 182, introduced Mar. 29, 1910, both by Mr. Roberts.

The Radio Act of 1912 contained no standard although it is replete with provisions designed to prevent interference with government stations, distress traffic by ship and shore stations, and stations engaged in public correspondence.[16] For example, Sec. 4(15) provided:

> "Fifteenth. No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce and Labor contained in the license of the station: * * *."

The next item of interest occurred after the World War, with the introduction of a bill of general regulative scope on March 8, 1920, which provided in part:

> "Section 7. Except in the case of experiments in the development of the art, a license shall not be granted to any station not in actual process of construction or already constructed at the date of the passage of this Act, *if the operation of the proposed station will seriously interfere with the operation of existing Government or licensed stations or is not necessary for the good of the general public service.* * * *"[17] (Italics supplied)

The first of the four National Radio Conferences, which, under the leadership of the Secretary of Commerce, were to play an important role in the shaping of radio legislation, was held at the call of Mr. Hoover from February 27 to March 2, 1922, was attended by Mr. (now Senator) White of Maine, who had already become the principal pro-

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[16] See particularly the many specific regulations in Sec. 4 of the Act.

[17] S. 4038, 66th Cong., introduced by Mr. Poindexter. He introduced a substantially identical bill, S. 31, in the 67th Cong. on Apr. 12, 1921.

ponent of such legislation in the House. Among the many recommendations adopted by this conference were the following:

> "RESOLVED, That the Conference on Radio Telephony recommend that the radio laws be amended so as to give the Secretary of Commerce adequate legal authority for the effective control of—
>
> "(1) The establishment of all radio transmitting stations except amateur, experimental, and Government stations.
>
> "(2) The operation of nongovernmental radio transmitting stations.
>
> "RESOLVED, That it is the sense of the conference that radio communication is a public utility and as such should be regulated and controlled by the Federal Government *in the public interest.*"[18] (Italics supplied.)

Prior to these recommendations, Mr. White introduced the first of the long series of bills by him, on April 18, 1921, containing the following:

> "Sec. 7. That no license shall be granted to any station, the operation of which will unduly interfere * * *, nor to any station *which is not in the interest of the general public service.*"[19] (Italics supplied.)

On May 6, 1921, he introduced a second bill containing the following:

> "Sec. 2 (b) * * * The Secretary of Commerce may in his discretion upon application therefor issue licenses to other radio receiving stations *when any public purpose will be served thereby.*"[20] (Italics supplied.)

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[18] Dept. of Commerce Radio Service Bulletin, No. 61, May 1, 1922, p. 23. The words "public interest" are used repeatedly in the other recommendations, including its enumeration of "Considerations to be Followed in Granting Licenses", *Ibid*, pp. 27-28.

[19] H. R. 4132, 67th Cong.

[20] H. R. 5889, 67th Cong.

This is the original of what became the first paragraph of Sec. 9 of the Radio Act of 1927. His next bill, introduced in the same Congress June 9, 1922, changed the phraseology of this provision to read as follows:

> "Section 2C. That the Secretary of Commerce, subject to the limitations of this Act, in his discretion, may grant to any applicant therefor a station license provided for in sections 1 and 2 hereof, except that he may grant such license only to a station *which is in the interest of the general public service.*"[21] (Italics supplied.)

His fourth bill, which as above stated passed the House January 31, 1923, omitted the clause beginning "except that," for reasons which we are unable to state.

Simultaneously a series of parallel bills was introduced in the Senate by Senator Kellogg. The first of these, introduced May 6, 1921, contained the following:

> "Sec. 7. That no license shall be granted to * * * any station which is not in the interest of the general public service."[22]

The second, introduced June 8, 1922, contained a provision identical with that in Mr. White's second bill, above-quoted.[23]

The standard in its present form first appeared in a bill introduced in the Senate on March 10, 1924 by Senator Dill. It contained provisions corresponding to Sec. 4 (opening clause) and Sec. 21 (first paragraph) of the Radio Act of 1927, and used the words "public convenience, interest, or necessity."[24]

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[21] H. R. 11964, 67th Cong.

[22] S. 1627, 67th Cong.

[23] S. 3694, 67th Cong.

[24] S. 2796, 68th Cong. S. 2930, as reported by the House Committee on Merchant Marine and Fisheries May 13, 1924, contained identical provisions. The committee report stated:

> "Paragraph (B) of section 1 recognizes that radio communication has reached such a stage of development and use

The recommendations adopted by the Fourth National Radio Conference, held November 9 to 11, 1925, and largely relied upon by the sponsors of radio legislation in the 69th Congress, included the following:

"4. * * *

* * * * * *

"(d) That those engaged in radio broadcasting shall not be required to devote their property to public use and their properties are therefore not public utilities in fact or in law; provided, however, that a license or a permit to engage in radio communication shall be issued only to those who in the opinion of the Secretary of Commerce will render a benefit to the public; or are necessary in the public interest; or are contributing to the development of the art.

* * * * *

"(i) No license shall be issued to operate a transmitting station not already operating in radio communication, except mobile or amateur stations, unless prior to the application for such license there shall have been issued by the Secretary of Commerce an erection permit; provided further, that an erection permit to engage in radio communication shall be issued only to those who, in the opinion of the Secretary of Commerce, will render a benefit to the public; or are necessary to the public interest; or are contributing to the development of the art.

* * * * * [25]

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that the public's interest and rights are involved. It is imperative that indiscriminate and unrestrained transmission shall not be permitted and that licenses shall be issued only in those cases in which some public interest, necessity or convenience is thereby served."

H. Rep. 719, 68th Cong., p. 2.

[25] Reprinted in 67 Cong. Rec. 5479, Mar. 12, 1926.

2. DEBATES AND COMMITTEE REPORTS.

The importance of the subject considered, there is surprisingly little discussion of the meaning of the standard "public interest, convenience or necessity" in the entire series of committee reports and congressional debates in the period 1923-1927. For the most part, recourse must be had to the many statements setting forth the purposes of the statute, made by the managers and principal proponents of the legislation (Senator Dill in the Senate and Mr. White in the House). These, however, are so lengthy and involve so much repetition, both as between themselves and on matters that are common knowledge, that it is impracticable to reprint more than limited excerpts.

(a) *Extract from Remarks of Mr. White, January 31, 1923.*[26]

"*Mr. White of Maine:* * * * This right to operate radio stations, t nsmit these messages, send this energy out in the air, is not an absolute right in the citizen of the United States, to be exercised by him without leave or control by any governmental body. At most it is a qualified right, to be exercised under the rules and conditions Congress lays down. We undertake here to lay down the rules, and we create in this legislation the body to determine the application of those rules to the facts in every case. We do create a court, and that court is the Secretary of Commerce, clothed with plenary powers to consider facts, to pass on the merits, and then to render a decision according to the public interests.

"What is the situation that we are undertaking to correct? I can illustrate it by a specific case. There was a concern over in New York which obtained a license away back in May, 1920. It was found in the operation of that station that it interfered with communications between ships at sea, between ship and shore, and it was complained of by a number of people. It was complained of by the postal authorities, by the naval authorities, by numerous private users, and-

[26] In explanation of H. R. 13773, 67th Cong., 64 Cong. Rec. 2786.

by the press of the country located in New York. Ultimately the question came up to the Secretary as to whether he should revoke that license. For weeks and weeks and month after month that matter had been kept in the air. That station continued to operate in violation of the interests of the public, endangering every day it operated the lives of people at sea on the Atlantic coast. Finally the Secretary of Commerce issued an order revoking that license, and then the holder of that license came into court, petitioned for a mandamus directing the Secretary of Commerce to issue to him a license, and a court finally issued the order of mandamus to the Secretary of Commerce directing him to issue a license to that station, which had flagrantly violated the rights of the Nation and of the people of the Country."

(b) *Extracts from Remarks of Mr. White, March 12, 1926.*[27]

"* * * The Government's task is to regulate and control a situation of such complexity under a statute framed under the conditions and with the knowledge existing in 1912. It has been held by the Court of Appeals of the District of Columbia that it is mandatory upon the Secretary of Commerce under the act of 1912 to issue a license to transmit to every applicant. The problem has been, therefore, how to distribute a limited number of wave lengths among an unlimited number of stations. By various expedients, by division of time, by power limitation, by geographical separation, and by other means of doubtful legal authority the department has sought to solve a difficulty which is inherent in the situation if there is a right in everyone who wishes to transmit to do so.

"The congestion in the broadcasting field—and it is this means of communication in which the public is chiefly interested—minimizes the value of all stations. *There is inequitable geographical distribution of stations, overlapping of areas served, confusion and intolerable interference and bad as the situation now is it threatens to be worse.* There are now on file in the

[27] In explanation of H. R. 9971, 69th Cong., which ultimately became the Radio Act of 1927, 67 Cong. Rec. 5478-80.

department approximately 425 applications. Add those to the 536 now outstanding and we would have a total of 961, or 11 stations for each wave length. Such a result means the complete breakdown of broadcasting service within the United States. This result is inevitable under existing law. It is universally recognized. Its appreciation is responsible for the widespread interest in radio legislation and for the general hope that Congress will confer the powers necessary to avert the impending calamity. (Italics supplied)

* * * * * *

"* * * These powers are hereafter to be exercised under a different principle than has heretofore controlled. We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual to use the ether. This is the first and most fundamental difference between the pending bill and the present law.

"The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that *licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in public interest, or would contribute to the development of the art.* This principle was approved by every witness before your committee. *We have written it into the bill.* If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served. The same rule is asserted with respect to other forms of transmission. (Italics supplied)

"We have sought in other ways to make more certain a proper regard for public as opposed to private right. Under existing law, there is no limitation upon the right of the Secretary to grant licenses for such time as he approves. He might grant a license for 50, a 100 years, or in perpetuity. In the present bill we

definitely challenge and curtail this power. We limit the life of every license to five years but with a right of renewal.

* * * * *

"Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago 40 stations, of New York 38, of Philadelphia 22, and of San Francisco 22. Stations so centered detract from the value of each other and interfere with the highest quality of service. In the bill before you the Secretary is given authority in passing upon a license to consider its proposed location and the area to be served thereby, and he is enjoined to effect an equitable geographical distribution of stations over the entire country.

* * * * *

"* * * We have provided checks upon the arbitrary and improper exercise of power by a single man. *In the first instance broad and somewhat unusual authority is vested in the Secretary of Commerce. But this is not power to be exercised at his will. We have laid down the rule of public interest to guide and restrain him in his decisions.* We have in addition set up a commission, bipartisan in character, regional in representation, to which every decision of the Secretary may be appealed and we have provided an appeal to the Court of Appeals of the District from decisions of Secretary or commission in major matters."[28] (Italics supplied)

(c) *Extracts from Remarks of Mr. Dill, June 30, 1926.*[29]

"When broadcasting developed and the Secretary of Commerce found he was without power to regulate it he began calling annual conferences of those interested in radio broadcasting, including broadcasters, manufacturers, and distributors of radio apparatus. The first conference was held in 1922 to consider the prob-

[28] 67 Cong. Rec. 5479-80.

[29] In explanation of H. R. 9971, 69th Cong., as reported by the Senate Comittee on Interstate Commerce.

lems that had already developed in connection with broadcasting. * * *[30]

* * * * *

"In the case of Hoover v. Intercity Radio Co. (286 Fed. 1003) the court declared that under the law the Secretary of Commerce has no discretionary power in the issuance of licenses when application is made. In that case the Secretary of Commerce had refused to renew the license, because he said there was no available wave length that could be used without interfering with existing radio service.

"The Intercity Co. brought an action in court for a writ of mandamus and the court granted the writ. Nevertheless, in the face of this decision the Secretary has refused to grant licenses for the 639 applications now on file in the department. To do so, he declares, would mean chaos in radio broadcasting.

"The only other case of testing the law in court developed a few weeks ago when the Secretary of Commerce refused to grant a license to the Zenith Radio Corporation of Chicago for use of a wave length more than two hours per week. * * *

* * * * *

"There is another feature of the law that makes the need of legislation even more imperative than the conditions I have just described. I refer to the fact that the present law places no limit on the length of time for which the Secretary of Commerce may grant licenses. * * *[31]

* * * * *

"* * * Those stations are in existence largely because they came to the Department of Commerce with their applications, and, when nobody else was making applications, their applications were granted. *As a result there is a great deal of injustice being done in the distribution of radio stations to-day.*

* * * * *

"The Senate committee did not feel that any one man, however good and however wise he might be,

[30] 67 Cong. Rec. 12350.

[31] *Ibid.* 12351.

ought to be entrusted with the discretion of saying who shall and who shall not have a monopoly of the air in a particular community. * * * [32] (Italics supplied)

* * * * *

"* * * He does not and he can not give consideration to these great problems affecting the *economic and social* life of the country, as radio is more and more affecting them, and the committee believes that problems of this kind should be considered not by clerks but by men chosen to study the questions, to consider them from every angle, and then to provide, as the bill provides, fair, efficient, and equitable radio service.[33] (Italics supplied)

* * * * *

"*Senator Cummins:* * * * I wish the Senator would read that part of the bill which governs the commission in determining who shall have the license.

"*Senator Dill:* There are two provisions: One is that they shall grant licenses unless public convenience and interest forbids, and the other is that they shall give fair, efficient, and equitable radio service to each community. Those are the two things which really govern the commission, I should say.

"*Senator Cummins:* I instanced both of them when I said they were controlled only by what they regarded to be the public interest.[34]

* * * * *

"* * * I want to disagree with my good friend from Utah, who said a while ago that this commission should be composed of experts. I do not think so. I think it should be composed of men who have an understanding of the public needs, men of vision and great ability, who will depend upon experts in radio for the necessary technical information, but who will administer this law from the standpoint of the public's interest, and particularly with a view to the future develop-

[32] *Ibid*, 12353.
[33] *Ibid*, 12354.
[34] *Ibid*, 12355.

ment of the radio art for the *social and economic* good of our people. * * *"[35] (Italics supplied)

(d) *Extracts from Remarks of Mr. White, January 29, 1927.*[36]

"* * * This legislation may fall far short of what it should be, but it is at least a step in the right direction. First and foremost, it asserts unequivocally the power and authority of the United States over this means of communication and gives to the Federal Government power over the vital factors of radio communication. It gives to the commission, and thereafter to the Secretary of Commerce, subject to appeal to the commission, the power to issue licenses if the public interest or the public convenience or public necessity will be served thereby.

"This is a new rule asserted for the first time, and it is offered to you as an advance over the present right of the individual to demand a license whether he will render service to the public thereunder or not. It is one of the great advantages which this legislation offers you. The bill gives to the Federal Government the power to determine the wave length which every station shall use. Under the existing conditions licensees use the wave length they want, it matters not the consequences therefrom."[37]

(e) *Extracts from Remarks of Mr. Dill, February 3, 1927.*

"Let us suppose a case of the failure of the commission to follow the terms of the statute. I might illlustrate by that to the Senator what would be a case of an appeal. The bill provides that licenses shall be granted because of pubic convenience, interest, or necessity. If a license is refused, and it could be shown that the granting of that license would serve public interest, convenience, or necessity, I think a court might intervene.

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[35] *Ibid.* 12358.

[36] In explanation of H. R. 9971, 69th Cong., as it emerged from conference and passed both Houses.

[37] 68 Cong. Rec. 2579.

"The bill provides that licenses shall be distributed so that there shall be equality of service to the different States and communities, and if the commission refused to grant a license, and an applicant could show that a particular community was not receiving equitable service compared with other communities, I think the courts might interpose. Of course, I could not attempt to cover all the cases of appeal, but questions of that kind, I think, might be appealed."[38]

3. LIMITATIONS IMPOSED BY SECTION 326.

Aside from the several specific directions given the Commission by Congress,[39] aside from the mandate to effect "a fair, efficient, and equitable distribution of radio service,"[40] and aside from the provision that a broadcaster shall not be deemed a common carrier,[41] there is only one limitation of a general character imposed on the scope of the standard "public interest, convenience or necessity". This is by Sec. 326, reading as follows:

"Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."

Except for substituting "Commission" for "licensing authority", the section is identical with Sec. 29 of the Radio Act of 1927. It becomes of interest to determine the extent

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[38] 68 Cong. Rec. 2869.

[39] E.g., the prohibitions against issuance of licenses to alien interests in Sec. 310(a) or to monopolies in Sec. 311.

[40] Sec. 307(b), as amended June 5, 1936, c. 511, Sec. 2, 49 Stat. 1475.

[41] Sec. 3(h).

to which this section narrows what might otherwise be the scope of the statutory standard.

As was the case with many other provisions in the Radio Act of 1927, this section had its roots in recommendations of the national radio conferences. The Fourth National Radio Conference adopted the following legislative recommendation:

> "(c) That the doctrine of free speech be held inviolate."[42]

The bills introduced in the House in the 69th Congress, including the bill which passed the House March 15, 1926, contained no section corresponding to Sec. 29. Mr. White explained the omission as follows:

> "*Mr. LaGuardia.* The gentleman stated the recommendations, among which was a guaranty of free speech over the radio. What provision does the bill make to carry that out?
>
> "*Mr. White of Maine.* It does not touch that matter specifically. Personally, I felt that we could go no further than the Federal Constitution goes in that respect. The pending bill gives the Secretary no power of interfering with freedom of speech in any degree.
>
> "*Mr. LaGuardia.* It is the belief of the gentleman and the intent of Congress in passing this bill not to give the Secretary any power whatever in that respect in considering a license or the revocation of a license.
>
> "*Mr. White of Maine.* No power at all."[43]

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[42] 67 Cong. Rec. 5479. It also adopted a resolution

> "that any agency of program censorship other than public opinion is not necessary and would be detrimental to the advancement of the art."

Proc. of Fourth National Radio Conference, Gov. Pr. Off., pp. 10-11. See also

Proc. of Third National Radio Conference, Gov. Pr. Off. p. 13.

[43] 67 Cong. Rec. 5480, March 12, 1926.

Unsuccessful attempts were made to amend the bill so as to forbid defamation by radio and were opposed as being "very near censorship."[44]

The series of bills introduced in the Senate in that Congress, however, contained such a section.[45] The section was inserted in the House bill as reported by the Senate Committee on Interstate Commerce, and read as follows:

> "Sec. 8. Nothing in this Act shall be understood or construed to give the commission the power of censorship over the radio communications or signals transmitted by any radio station *except as herein stated and declared*, and no regulation or condition shall be promulgated or fixed by the commission which shall interfere with the right of free speech by means of radio communication *except as specifically stated and declared in this Act: Provided, That* no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."[46] (Italics supplied)

The reason for the qualification expressed in the italicized portions in the above was that the bill also contained a section forbidding "libelous or slanderous communication by radio."[47]

On the floor of the Senate Mr. Dill explained the section as follows:

> "* * * The bill does not give to the commission the power to censor programs, but instead there is a provision in the bill which specifically prohibits the commission from censoring programs in any way."[48]

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[44] 67 Cong. Rec. 5480, 5572-3, 5646.

[45] Sec. 14 of S. 1754 and Sec. 10 of S. 4057 introduced by Senator Dill.

[46] H. R. 9971, as reported May 8, 1926. S. Rep. 772. This report (p. 4) described the above section as follows:

> "The commission shall not be permitted to exercise the power of censorship over radio programs, but no person shall utter any obscene, indecent, or profane language by radio."

[47] *Ibid*, Sec. 7.

[48] 67 Cong. Rec. 12615.

When the bill emerged from conference, the prohibition against defamation had disappeared, and the italicized portions of the above-quoted section had been stricken out. There was criticism of the bill in both Houses because it failed to include any provision to curb "private censorship"[49] and, in the House, because of deletion of the prohibition against defamation.[50]

It seems clear that the Radio Act of 1927 was enacted by Congress with the distinct understanding by those that voted for it that the Act gave the licensing authority no power to censor programs in any way, much less to take any action abridging freedom of speech.

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[49] 68 Cong. Rec. 2567, 3257. See also 67 Cong. Rec. 5484.

[50] 68 Cong. Rec. 2567.

APPENDIX B.

The Commission's Administrative Construction of the Pertinent Provisions of the Communications Act of 1934.

By "Commission" is meant the Federal Radio Commission from the date of its organization on March 15, 1927, until July, 1934, and thereafter the Federal Communications Commission.

I. THE COMMISSION'S CONSTRUCTION OF SECS. 309 (a) and 319[1] TO REQUIRE OPPORTUNITY FOR HEARING FOR PERSONS ADVERSELY AFFECTED.

(1). On May 26, 1927, the Federal Radio Commission promulgated its first regulations governing hearings on applications, in its General Order No. 12, which in part provided:

> "All persons interested in *the granting or refusal of the application* and the frequency therein applied for, including other licensees authorized to use the frequency requested, licensees upon frequencies where interference is claimed, other applicants for the same frequency, and representatives of the public in general, may appear and will be heard upon any relevant matters. The commission may likewise introduce witnesses or affidavits."[2] (Italics supplied)

These regulations remained in effect until September 1, 1930, when superseded by a revised and more elaborate set of rules adopted June 25, 1930 (see below).

On January 18, 1929, in a written report to the House Committee on Merchant Marine and Fisheries, discussing the need for amendments in the Radio Act of 1927, the Commission's general counsel stated:

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[1] Including the corresponding portions of Secs. 11 and 21 of the Radio Act of 1927.

[2] First Ann. Rep. of Federal Radio Commission, 1927, p. 15.

"* * * It [Sec. 11] does not provide for or require any notice to interested parties and does not give such parties any standing in hearings before the Commission, although the Commission has regularly recognized such parties and permitted them to participate in its hearings."[3]

On May 15, 1929, the Chairman of the Federal Radio Commission, testifying before the Senate Committee on Interstate Commerce, stated:

"*Commissioner Robinson:* The practice is now different. I have frequently ruled that any man rising in our hearing and asking to be heard, is entitled to be heard because he has an interest, because he is one of the public, and the practice has been largely liberalized in that particular. * * *."[4]

In December, 1929, the Federal Radio Commission itself described its hearing procedure as follows:

"* * * Other licensees or applicants who have an interest in the matter or who would be adversely affected by the granting of the application are notified and given an opportunity to be heard and oppose the action. * * *"[5]

Contemporary descriptions of the Commission's practice are to the same effect:

"* * * Other licensees or applicants, who by reason of threatened interference or otherwise have an interest in the matter, are notified and given an opportunity to be heard."* (footnote) The Commission has, in practice, not only usually given notice to parties shown by its records to be interested but has given general notice to the public of pending applications through its Press Bureau. * * *."[6]

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[3] United States Daily, Jan. 18, 1929.

[4] Hearings on S. 6, 71st Cong., before the Senate Committee on Interstate Commerce, p. 173.

[5] Third Ann. Rep. of Federal Radio Commission to Congress, 1929, p. 54.

[6] Report of Standing Committee on Radio Law, 1929, 54 A. B. A. Rep. 455.

"* * * Notice is sent of the nature of the application and of the time and place set for hearing, to other persons which the Commission considers interested. Who are interested parties is discussed below. Some measure of notice is also given the public through public announcement through the Commission's Press Bureau. There is no certain means whereby an applicant can ascertain prior to hearing what persons, if any, will appear to oppose the application. * * *

* * * * *

"There is an increasing tendency to recognize interests of an economic character. For example, in a town which is able to support only two stations with advertising or sponsored programs, each of the two existing stations is considered to have a legitimate interest in opposing the establishment of a new station.

* * * * *

"The Act gives no status to States or other political subdivisions, or to Governmental Departments, or to the representatives of foreign nations or stations, with respect to applications and hearings before the Commission, although all of them will from time to time be vitally interested. The Commission has, however, pursued a very liberal policy in this regard and permits intervention in its hearings of virtually anyone having a legitimate interest (and, occasionally, of persons who have not)."[7]

On March 1, 1929, the Commission's law department submitted to the Commission a draft compilation[8] of proposed rules and regulations, incorporating rules of practice and procedure, including the following:

"Sec. 3. *Applications Granted without Hearing.* The Commission will grant an application in whole or in part without hearing if in addition to its not falling within any of the cases covered by Sections 1 and 2 of this sub-title, it appears conclusively to the Commis-

[7] Caldwell, Practice and Procedure before the Federal Radio Commission, 1 Jour. Air Law, 169, 180, Apr. 1930.

[8] Available only in mimeographed form.

sion from the face of such application, from documents submitted therewith, and from such other information as the Commission may have

"(a) That the granting of such application, either in whole or in part, will serve public interest, convenience, or necessity, and

"(b) That the granting of such application, either in whole or in part, will not aggrieve or adversely affect the interests of any person, firm, company or corporation holding a permit, license or other instrument of authorization from the Commission or having an application therefor pending before the Commission.

* * * * *

"Sec. 4. *Determination of Interest.* The determination of what persons, if any, have interests which would be adversely affected by the granting of any application, shall rest primarily on the question of interference, including heterodyne, cross-talk, blanketing, and harmonics, and the Secretary, in mailing such determination shall be guided largely by the advice of the Chief Engineer of the Commission. Persons may also be considered to have such interests, however, who have an established radio communication service in the same region or between the same or part of the same points and with whom the applicant would come into competition if the application should be granted. In such a case, where the issue is raised as to whether there is need or adequate support for the proposed additional service and whether such service would cause undue hardship to existing services, such persons shall be notified and permitted to be heard with respect to the application. The foregoing shall not be construed to prevent the Commission from considering other persons as proper parties.

"Sec. 5. *Intervention.* Any person, firm, company, or corporation and any State or political division thereof, may, at any time more than two days prior to the date of hearing, file with the Commission a petition to intervene either in support of or in opposition to any application designated for hearing. If such pe-

tition discloses that the petitioner has a substantial interest in the granting or denying of the application, the Commission will grant the petition and permit the petitioner to be heard at such hearing."

This draft underwent study and several successive revisions, to become the basis of the formal rules and regulations described below.

(2) On June 25, 1930, by its General Order No. 93, the Federal Radio Commission adopted its first formal set of rules governing practice and procedure, effective September 1, 1930.[9] These rules included the following:

"**Subtitle B.—Action on Applications.**

"Sec. 5. *Applications granted without hearing.* The commission will grant an application in whole or in part without hearing on the merits if it does not fall within any of the cases covered by sections 1 and 3 of this subtitle, or if it has been determined to be proper after a hearing pursuant to section 4 and in addition thereto it appears conclusively to the commission from the face of such application, from documents submitted therewith and from such other information as the commision may have—

"(a) That the granting of such application either in whole or in part would serve public interest, convenience and necessity, and

"(b) That the granting of such application either in whole or in part would not aggrieve or adversely affect the interest of any person, firm, company, or corporation holding a permit, license or other instrument of authorization from the commission, or having an application therefor pending before the commission.

* * * * *

"Sec. 7. *All other applications designated for hearing.* In cases where the application is or has, pursuant to section 4 hereof, been determined to be proper

[9] Fourth Ann. Rep. of Federal Radio Commission to Congress, pp. 25-33; also published in pamphlet form, Practice and Procedure before the Federal Radio Commission, Gov. Pr. Off., 1930.

upon its face but the commission is unable to determine without a hearing on the merits;

"(a) That the granting of such application either in whole or in part would serve public interest, convenience, or necessity;

"(b) That the granting of such application either in whole or in part would not aggrieve or adversely affect the interest of any person, firm, company, or corporation holding a permit, license, or other instrument of authorization from the commission, or having an application therefor pending before the commission,

the commission will designate the same for hearing and the following procedure will govern:

* * * * *"

"Subtitle D.—Formal Hearings and the Conduct Thereof.

"Section 1. *Parties to hearings.* All persons who are permitted to be heard in support of any application made by them shall be referred to as 'applicants.' All persons who are permitted to be heard in opposition to any application or licensees against whom revocation proceedings are instituted shall be referred to as 'respondents.' All persons, firms, companies, or corporations holding permits, licenses, or other instruments of authorization from the commission, or who have applications pending before the commission who would be aggrieved, or whose interests would be adversely affected by the granting of any application designated for hearing, shall constitute proper parties respondent and shall be notified of any such hearing.

* * * * * *

"Sec. 3. *Intervention.* Any governmental department or officer, any person, firm, company, or corporation, or any State or political subdivision thereof may, at any time, more than 10 days prior to the date of any hearing, file with the commission a petition to intervene therein in support of or in opposition to any application designated for hearing. If the petition discloses a substantial interest in the subject matter of the hear-

ing the commission will grant the same and permit the petitioner to be heard at such hearing subject to regulations hereinafter imposed."

With respect to this compilation the Commission had the following to say:

"While the commission has at various times since its organization enacted and promulgated various rules and regulations governing practice and procedure and attempts at codification have been made, it was not successful in achieving this result until June 25, 1930. The causes for this delay have been chiefly two in number. In the first place, the commission itself was not established in its present form upon a permanent basis until December 18, 1929, it being orginally intended that it should act after a time as a purely appellant body. In the second place, there has been no precedent or analogy upon which to draw and the very nature of the commission's duties under the act made any such rules and regulations almost impossible of speedy enactment.

"It is respectfully submitted that no board or commission under either Federal or State law passes on problems which directly affect such a large part of the entire public and that in no other field of litigation are the parties to the proceedings drawn from such widely separated geographical districts. It is not uncommon in the case of a hearing involving the designation of one of the regional or local channels to have residents of the Pacific and Atlantic coastal areas interested as parties as well as others who reside at intermediate points. Obviously any system of orderly procedure tends to work a hardship on the parties in certain cases, and in the case of the minor operator the cost of personally attending hearings every time that his interests might be affected is virtually prohibitive. On the other hand, orderly administration without orderly procedure is an impossibility. It was with this in mind that the commission adopted General Order No. 93 providing for a comprehensive set of rules and regulations governing practice and procedure before it. A sufficient number of copies have been printed to supply all persons having a legitimate interest therein,

and these are available by request directed to the secretary of the commission. Copies have been mailed to all station licensees and others who are interested in cases set for hearing."[10]

In the following year the Commission stated the following:

"Statements of Fact and Grounds For Decision.

"Section 16 of the radio act of 1927, as amended, requires the Federal Radio Commission, in all appeals from its decisions, to file with the Court of Appeals of the District of Columbia a 'copy of its decision • • • and a full statement in writing of the facts and the grounds for its decision as found and given by it.' In line with this provision the commission, in February, 1931, decided to issue a decision or a statement in writing of the facts and the grounds for its decision in all cases where the decision is adverse to a party of record in the case, or in all cases which may be appealed under the provisions of section 16 of the act. Very little precedent has been established in the field of radio law, either through pronouncements of the courts or of the commission. The issuance of opinions by the commission has served two distinct purposes—first, to apprise the parties and the courts of the position taken by the commission as well as the reasons therefor; and, second, to make known certain definite elements essential in reaching a determination on the standard of public interest, convenience, and necessity.

"It would seem necessary that a litigant be advised as to the position of the commission in order that he may fully protect his interests upon appeal. It is also important that there exist certain well-defined principles which the radio profession may reasonably expect the commission to consider in arriving at a decision upon any application. If these purposes are served, the commission will better be able to carry out the duties imposed upon it by the Congress in the radio act of 1927."[11]

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[10] Fourth Ann. Rep. of the Federal Radio Commission to Congress, 1930, p. 54.

[11] Fifth Ann. Rep. of the Federal Radio Commission, 1931, pp. 9-10.

The working of the new rules was contemporaneously described in part as follows:

"* * * As a result of the new regulations there has been a marked improvement in the machinery of handling hearings, particularly with reference to the setting up of more clearly defined issues and more adequate notice to interested parties. In only a few cases has the Commission attempted to take action on controversial matters without notice and opportunity for hearing to the interested parties and the tendency is now to set every application for hearing unless it clearly appears that it is non-controversial or that all interested parties have consented to its being granted.

* * * * *

"Contemporaneously with, and pursuant to, the new rules and regulations, was established an examiner system for the holding of hearings. The Examiners' Division of the Commission now consists of a chief examiner and three examiners who, with the exception of only two or three matters, have conducted all the hearings held during the past year.

* * * * *

"In a large proportion of the cases on which examiners' reports were submitted, the Commission rendered decisions which were pursuant to the recommendations of the examiners, although in a substantial number the examiners' recommendations were reversed. For the first several months, the Commission did not write or adopt separate decisions of its own and confined itself to either adopting or rejecting the reports of the examiners, with the result that in the former alternative the examiner's report constituted the decision of the Commission, and in the latter there was no written decision at all giving reasons for the action. During the past few months the practice has changed to the other extreme so that now the Commission (through its Legal Division) prepares and adopts separate findings of its own in almost all cases. * * *"[12]

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[12] Report of Standing Committee on Communications, 1931, 56 A. B. A. Rep. 369-70.

(3) On November 7, 1931, the Federal Radio Commission adopted a comprehensive set of rules and regulations, including a revision of its rules on practice and procedure, effective February 1, 1932.[18] These new rules of practice and procedure superseded the rules which had been in effect since September 1, 1930. Pertinent excerpts from the revision are as follows:

> "44. Any application which is properly filed and conforms to the regulations of the Commission with respect to the form used, manner of execution, completeness of answers to questions, and other information required, may be granted by the Commission without a hearing if it appears conclusive to the Commission from the face of such application, from documents submitted therewith, and from such other information as the Commission may have (a) that the granting of such application, either in whole or in part, would serve public interest, convenience, and necessity, and (b) that the granting of such application, either in whole or in part, would not aggrieve or adversely affect the interest of any person, firm, company, or corporation holding a permit, license, or other instrument of authorization from the Commission, or having an application therefor pending before the Commission, *Provided, however*, That any such grant shall be conditional and may be suspended and reconsidered by the Commission as hereinafter provided.
>
> "45. In any case where an application is granted in whole or in part without a hearing as provided in paragraph 44, any person, firm, or corporation aggrieved or whose interests are adversely affected by such grant, may obtain a hearing upon said application by adhering to the following procedure:
>
> "a. Such parties shall, within 20 days from the date on which public announcement of such grant is made at the principal office of the Commission, or from its

[18] Sixth Ann. Rep. of the Federal Radio Commission, 1932, pp. 15-17. This set of rules was published in a loose-leaf handbook, comprising 143 printed pages, Gov. Pr. Off., 1932. See Caldwell, New Rules and Regulations of the Federal Radio Commission, 2 Jour. Radio Law 66

effective date if a later date is specified by the Commission file with the Commission and serve upon or mail to the applicant a protest in writing directed to the action of the Commission making such grant.

"b. Such protest shall be executed and sworn to by a person having knowledge of the facts therein stated and shall contain:

"(1) A statement of protestant's interest in the matter.

"(2) A terse, yet complete statement of the facts which protestant expects to prove upon hearing, and

"(3) Proof of service upon the applicant.

"c. Upon receipt by the Commission of such protest the application involved will be set for hearing in the same manner in which other applications are set for hearing and the applicant and other parties in interest notified thereof: *Provided, however*, That upon such hearing the verified protest shall be taken as a pleading limiting the issues to be tried, but not as evidence of the facts therein stated.

* * * * *

"48. In cases where the application is proper upon its face but the Commission is unable to determine, without a hearing on the merits, that the granting of such application either in whole or in part would serve public interest, convenience, or necessity, and that the granting of such application either in whole or in part would not aggrieve or adversely affect the interest of any person, firm, company, or corporation holding a permit, license, or other instrument of authorization from the Commission, or having an application therefor pending before the Commission, the Commission will designate the same for hearing and the following procedure will govern: * * *

* * * * *

"57. All persons who are permitted to be heard in support of any application made by them shall be referred to as 'applicants.' All persons who are permitted to be heard in opposition to any application or licensees against whom revocation proceedings are in-

stituted shall be referred to as 'respondents.' All persons, firms, companies, or corporations holding permits, licenses, or other instruments of authorization from the Commission, or who have applications pending before the Commission who would be aggrieved, or whose interests would be adversely affected by the granting of any application designated for hearing, shall constitute proper parties respondent and shall be notified of any such hearing.

* * * * * *

"59. Any governmental department or officer, any person, firm, company, or corporation, or any State or political subdivision thereof may, at any time, more than 10 days prior to the date of any hearing, file with the Commission a petition to intervene therein in support of or in opposition to any application designated for hearing. If the petition discloses a substantial interest in the subject matter of the hearing the Commission will grant the same and permit the petitioner to be heard at such hearing subject to regulations hereinafter imposed."

The principal change was introduced by Rules 44 and 45, having to do with protests. In this connection the Commission had the following to say:

"Another material change in the rules concerns the action of the commission which may be taken upon applications without a formal hearing. In this connection, rule 44 provides that any application properly filed and conforming to the regulations of the commission may be granted without a hearing if, upon the face of the application and such information as the commission may have before it, the commission is of the opinion that public interest, convenience, and necessity would be served thereby. Such a grant, however, is expressly made conditional and subject to the provisions of rule 45 which permits any person aggrieved or whose interests are adversely affected by such grant to file a formal protest within 20 days from the date of the original grant. Such protest is required to conform to certain formalities with respect to the execution thereof and to set out the interest of the

protestant and to make certain allegations of fact in support of the protest. Upon receipt of the protest, the authority granted becomes automatically suspended unless otherwise ordered by the commission, and the application is designated for hearing upon the issues contained in the protest. Although this provision has been in force for a relatively short time, it has been found that such procedure facilitates the work of the commission and at the same time affords all parties in interest opportunity to object and obtain the benefit of a formal hearing before the commission if they so desire.'"[14]

The practice under these rules was contemporaneously described in part as follows:

"Space will not permit a summary either of the new regulations or of the changes introduced by them in the scheme of regulation previously in force. One of the more noteworthy is a set of provisions, which while retaining the power of the Commission to grant applications without hearing, gives parties who are adversely affected by such an action the right to obtain a hearing on protest filed within 20 days, the Commission's action to be inoperative until after decision resulting from the hearing. In actual practice the new rules on this subject have worked out satisfactorily, and have tended to eliminate the unjust situations which so frequently arose under the Commission's earlier procedure and which resulted in a long series of nullifications of its actions by the Court of Appeals. As has been pointed out in another connection, it is still uncertain whether a person adversely affected in a purely economic sense has any standing to make an effective protest or to participate in a hearing as a party respondent and, while the Commission has tended on the whole to be liberal in recognizing the rights of such persons, it has not been consistent in all cases."[15]

[14] Sixth Ann. Rep. of the Federal Radio Commission to Congress, 1932, p. 16.

[15] Report of Standing Committee on Communications, 1932, 57 A. B. A. Rep. 448-9

These rules continued in force throughout the remainder of the life of the Federal Radio Commission.

(4) The Communications Act of 1934, approved June 19, 1934, continued in effect the Commission's Rules of Practice and Procedure.

Section 604(a) provides as follows:

> "Sec. 604. (a) All orders, determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted by the Interstate Commerce Commission, the Federal Radio Commission, or the Postmaster General, under any provision of law repealed or amended by this Act or in the exercise of duties, powers, or functions transferred to the Commission by this Act, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law."

Thus, by legislative enactment the Rules of Practice and Procedure adopted February 1, 1932 by the Federal Radio Commission became applicable to proceedings before the Federal Communications Commission, which was organized July 11, 1934 (see Rules 44, 45, 48, 57 and 59 supra).

(5) On December 18, 1935, the Federal Communications Commission adopted a further revision of the rules governing practice and procedure.[16] These rules remained in effect, without material change, until January 1, 1939, and were in effect at all times during the period when the instant proceedings were pending before the Commission. The pertinent provisions were as follows:

> "104.6. In cases where the application is proper upon its face but the Commission is unable to determine, without a hearing on the merits, that the granting of such application, either in whole or in part, would serve public interest, convenience, or necessity,

[16] Federal Communications Commission, Practice and Procedure, Gov. Pr. Off., 1936.

and that the granting of such application, either in whole or in part, would not aggrieve or adversely affect the interests of any licensee, or any person having a pending application, the Commission will designate the same for hearing and the following procedure will govern: * * *"

"104.4. When upon application any instrument of authorization is granted by the Commission without a hearing pursuant to section 309(a) of the Act, such grant shall remain conditional for a period of not less than 30 days from the date on which public announcement thereof is made, or from its effective date, if a later date is specified, during which 30 days any person aggrieved or whose interests may be adversely affected may obtain a hearing upon such an application by filing a protest as set forth in rule 105.21(b).

"Upon the filing of such a protest, the application involved will be set for hearing in the same manner in which other applications are set for hearing, and the applicant and other interested parties notified. * * * "

"105.21(b). Protests to any application granted by the Commission without a hearing under section 309(a) of title III of the Act (see rule 104.4) shall be subscribed and verified by the protestant and shall contain:

"1. A statement of protestant's interest in the matter;

"2. A terse yet complete statement of facts which protestant expects to prove upon the hearing, and,

"3. Proof of service upon the applicant."

"102.6. The term 'intervener' means a party who upon petition has been permitted to become a party to any proceeding before the Commission."

"102.7(c) A party who is aggrieved or whose interests are adversely affected by any decision of the Commission granting without a hearing any application for an instrument of authorization under section 309(a) of the Act." (defining protestant)

"102.8(b) Any licensee or pending applicant for any instrument of authorization who would be aggrieved, or whose interests would be adversely affected by the granting of any application designated for hearing; or a licensee against whom the Commission has instituted revocation proceedings." (defining respondent)

"105.20 Any party may, at any time, more than 10 days prior to the date of any hearing, file with the Commission a petition to intervene. If the petition discloses a substantial interest in the subject matter of the hearing, the Commission may grant the same and permit the petitioner to be heard at such hearing."

(6) On November 28, 1938, the Federal Communications Commission adopted a further revision of its rules governing practice and procedure,[17] effective January 1, 1939. The following provisions are pertinent:

"Sec. 3.08(b) *Respondent.* The term 'respondent' means: Any licensee, applicant for any certificate, certification, or instrument of authorization, or other person who may be aggrieved or whose interest may be adversely affected by the granting of any application designated for hearing, and who is named in the Commission's notice of designation for hearing, or a licensee or holder of an instrument of authorization or certification which the Commission is empowered to grant, and against whom the Commission has instituted revocation, suspension, modification or cancellation proceedings."

"Sec. 6.02 *Intervention.* Petitions for intervention shall disclose a substantial interest in the subject matter of the hearing or investigation and must be subscribed and verified by the petitioner, in accordance with Section 3.02. Any person may, at any time more than ten days before the date scheduled for hearing, file with the Commission a petition to intervene."

"Sec. 14.04 *Petitions; contents.* Any party whose interests are aggrieved or adversely affected by any

[17] Available only in mimeographed form.

decision, order or requirement of the Commission may file a petition for rehearing of the same or any matter determined therein as provided in Section 405 of the Act. Such petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under Title III of the Act; * * *."

"Sec. 15.31 *Designation for hearing.* In cases where the application is proper upon its face but the Commission is unable to determine, without a hearing on the merits, that the granting of such application, either in whole or in part, would serve public interest, convenience, or necessity, and that the granting of such application, either in whole or in part, would not aggrieve, or adversely affect the interest of any licensee, or any person having a pending application, the Commission will designate the same for hearing and the following procedure will govern: * * *"

(7) On July 12, 1939, the Federal Communications Commission adopted a further revision of its rules governing practice and procedure,[15] effective August 1, 1939. The following provisions are pertinent:

"§1.54. *Intervener.* The term 'intervener' means a party who, upon petition, has been permitted to become a party to any proceeding before the Commission.

* * * * *

§1.58. *Respondent.* The term 'respondent' means a party against whom the Commission has, on its own motion, instituted an inquiry, investigation, revocation, suspension, modification, cancellation, or other proceeding.

* * * * *

"§1.102. *Intervention.* Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed or verified in accordance with Sec. 1.122. The granting of a petition to intervene

[15] Federal Register, July 19, 1939, pp. 3341 et seq.

shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

* * * * * *

"§1.271. *Petitions; contents.* Any party whose interests are aggrieved or adversely affected by any decision, order or requirement of the Commission may file a petition for rehearing of the same or any matter determined therein as provided in Section 405 of the Act. Such petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under Title III of the Act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order or requirement or any matter determined therein is claimed to be unjust, unwarranted or erroneous, and with respect to any finding of fact must specify the pages of record relied on. Where the existence of newly discovered evidence is claimed, the petition must be accompanied by a verified statement of the facts, together with the facts relied on to show that the petitioner with due diligence could not have known or discovered such facts at the time of the hearing.

* * * * *

"§1.382. *Designation for hearing.* In cases where an application for radio facilities is proper upon its face but the Commission is unable to determine upon examination of the same that the granting of such application, either in whole or in part, would serve public interest, convenience or necessity, the Commission will designate the same for hearing and the following procedure will govern it:

* * * * * *

In its most recent report to Congress,[19] the Commission stated:

> "Under its former rules the Commission permitted any party to intervene if his petition disclosed a 'substantial interest in the subject matter.' Furthermore the Commission designated as parties to its hearings those persons shown by its records to have some potential interest, whether or not such persons were known to have an intention to appear. The effects of comparatively unrestricted intervention and of automatic inclusion of parties to the proceeding were the unnecessary prolongation of discussion of noncontroversial issues and the unnecessary multiplication of evidence on relevant issues, due to the cross-examination to which witnesses were subjected by the various parties. The Commission's rules now require all parties who desire to appear in opposition to an application to file petitions to intervene, by means of which their interests may be tested, and parties are required to make a showing that the requested intervention will be in the public interest. At the same time, the Commission has made specific provision for the filing and consideration of motions for enlargement of the issues, a further safeguard for the protection of interests of applicants and other parties."[20]

(8) It is impracticable to enumerate the many hundreds of cases from 1927 to August 1, 1939, in which the Federal Radio Commission and its successor, the Federal Communications Commission, have recognized and given effect to the rules in force until August 1, 1939 by affording opportunity for hearing to persons aggrieved or whose interests would be adversely affected by the granting of an application.

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[19] Fifth Ann. Rep. of Federal Communications Commission, Nov. 15, 1939, for fiscal year ended June 30, 1939, p. 10. Obviously the above-quoted excerpt is intended to refer to the rules of practice in effect *since* August 1, 1939.

[20] See also discussion of Payne, Commissioner, in re Application of Hazelwood, Inc., Docket No. 5698, Oct. 2, 1939.

II. THE COMMISSION'S CONSTRUCTION OF "PERSONS ADVERSELY AFFECTED" TO INCLUDE LICENSEES AND OTHER APPLICANTS WHO WILL SUFFER ECONOMIC INJURY.

This heading necessarily partakes of both the preceding and the following headings, and need not be separately elaborated.

Not with complete consistency, but nevertheless as a general rule, the Federal Radio Commission and its successor the Federal Communications Commission have recognized that licensees of existing stations will be adversely affected by the establishment of a new station in the same community, and that such licensees have the right, therefore, to opportunity for hearing and otherwise to participate in the proceedings in opposition to granting the application for a new station. This right has been recognized in the early days of the Federal Radio Commission simply by permitting the licensee to appear and participate in the hearing, and later either by automatically making such a licensee a respondent by naming him in the notice of hearing or by permitting him to intervene on petition. This construction of Secs. 309(a) and 319 continued at least until August 1, 1939. The same construction was applied to *other* applicants for new stations or for increased facilities for existing stations in the same community, who would either suffer economic injury by the granting of the application in question or would face increased difficulty or probability of denial of their own applications on economic grounds should the application in question be granted.

It would be impracticable, if not impossible, to assemble the many instances where the foregoing construction has been given practical effect. Some idea of their number may be gathered from the next heading.

III. THE COMMISSION'S CONSTRUCTION OF THE STANDARD OF "PUBLIC INTEREST, CONVENIENCE OR NECESSITY" TO AUTHORIZE OR REQUIRE IT TO TAKE NATURE AND EXTENT OF ECONOMIC INJURY INTO ACCOUNT.

This heading necessarily has five sub-headings, corresponding to the several sections of Title III of the Communications Act in which the standard "public interest, convenience or necessity," or its equivalent, is prescribed for the Commission's guidance.

1. *Actions on Applications Under Secs. 307(a), 309(a) and 319.*[1]

(a) Except, perhaps, for the first year or so of its existence, the Federal Radio Commission (although not with entire consistency) interpreted the standard of public interest, convenience or necessity as authorizing or requiring it to take into account the nature and extent of economic injury which would be caused to the licensees of existing stations and to other applicants, in determining whether to grant or deny applications for construction permits, licenses, and modifications of license.

(b) An early decision, rendered January 31, 1929 on the application of Richmond Development Corporation,[2] contained the following findings of fact:

> "The evidence disclosed that Roanoke is now served by a broadcasting station (Station WDBJ) and that this station is rendering good service to the community; that in Roanoke the available talent for rendering

[1] Corresponding to Secs. 9, 11 (first paragraph) and 21 of the Radio Act of 1927. Separate consideration is not given to Sec. 312(b) since, while it also specifies the standard "public interest, convenience or necessity," it was not contained in the Radio Act of 1927, has not been applied to any appreciable extent, and is not likely to present situations of interest to this discussion.

[2] Docket 246. See Richmond Development Corp. v. Federal Radio Commission, 35 F. (2d) 883.

programs is limited; that the demand for advertising and the revenue which would be derived therefrom by broadcasting stations in Roanoke is limited; that Roanoke and vicinity are receiving the programs of the two national broadcasting chains from stations in Virginia and from many stations located elsewhere * * *.

* * * * * *

"Roanoke has one broadcasting station which is rendering good service to the public. To allow the construction and operation of a second station there would, because of the limited number of frequencies or channels available for broadcasting, preclude some other community of equal, or probably superior, importance from receiving its just and equitable right to a broadcasting station. We are of the opinion that the Commission should not permit the construction and operation of a second station in a city within a state if to do so would prevent another city or community of equal importance within that state from having and enjoying the benefits of a broadcasting station, especially when applications have been received from such communities that are without broadcasting facilities, as is true with Virginia."

(c) In another case, the Commission, on May 31, 1932, designated for hearing the application of Red Oak Radio Corporation, at Red Oak, Iowa, to move to Omaha, Nebraska, because of protests by three licensees of stations at Omaha, all based upon apprehended economic injury.[3] A hearing was held, as the result of which the Commission rendered a decision September 13, 1932, with the following findings:

"Although the general contention of respondents is that the addition of the station to the Omaha area might act to further limit their revenues and necessitate a reduction in the quality and amount of local sustaining programs broadcast by them, it does not appear that the operation of KICK near Omaha would to any ap-

[3] Docket 1678, May 31, 1932. See Woodmen of the World Life Insurance Association v. Federal Radio Commission, 57 F. (2d) 420.

preciable extent curtail the advertising business of respondents or that there is not sufficient business in that area to care for the advertising needs of both the respondent and applicant stations.

* * * * *

"4. It does not appear from this record that the operation of KICK at Carter Lake would so affect the interests and advertising revenues of any of the respondent stations as would necessitate any curtailment of either the quality or quantity of the service now rendered by them to the listening public."

(d) A list of cases in which the same or an analogous interpretation of the standard was recognized by the Federal Radio Commission is as follows:

In re Application of Great Lakes Broadcasting Company, et al, Docket Nos. 310, 312, 316, Decided December 17, 1928.

In re Intercity Radio Telegraph Company, et al, Docket Nos. 186, 453, Decided June 7, 1929.

In re Application of Jenny Wren Company, Lawrence, Kansas, Docket No. 1044, Decided October 16, 1931.

In re Application of A. B. Murray and T. P. Singletary, Baton Rouge, Louisiana, Docket No. 1069, Decided November 20, 1931.

In re Application of Hale Bros. Stores, Inc. & The Chronicle Publishing Company, National Broadcasting Company, Inc., San Francisco, California, Docket No. 1615, Decided June 10, 1932.

In re Application of WJSV, Incorporated and Old Dominion Broadcasting Company, Mt. Vernon Hills, Virginia, Docket No. 1656, Decided June 10, 1932.

In re Application of Iowa Broadcasting Company, Clarinda, Iowa, Docket No. 1649, Decided September 30, 1932.

In re Application of Sanders Brothers Radio Station, Joliet, Illinois, Docket No. 1693, Decided October 21, 1932.

In re Application of James M. Caldwell, Goodland, Kansas, Docket No. 1716, Decided December 16, 1932.

In re Applications of WBBM Broadcasting Corp. and KFAB Broadcasting Company, Docket Nos. 1668, 1669, 1670, 1671, Decided March 24, 1933.

In re Application of Midland Broadcasting Company, Kansas City, Missouri, Docket No. 1809, Decided June 16, 1933.

In re Application of F. J. Reynolds, Inc., Jacksonville, Florida, Docket No. 2181, Decided December 9, 1933.

In re Application of Peoria Broadcasting Company, Peoria, Illinois, Docket No. 1951, *Illinois Broadcasting Company*, Quincy, Illinois, Docket Nos. 2012 and 1918, Decided January 16, 1934.

In re Application of Leo J. Omelian, Erie, Pennsylvania, Docket No. 2046, Decided February 20, 1934.

In re Application of Frank P. Jackson, Docket Nos. 2149, 2207 and 2253, Decided June 22, 1934.

In re Application of Los Angeles Broadcasting Co., Inc., Los Angeles, California, Docket No. 2047, Decided June 1, 1934.

In re Application of WJJD, Incorporated, Chicago, Illinois, Docket No. 2314, Decided June 29, 1934.

(e) The Federal Communications Commission's interpretation of the standard has been, with few exceptions, the same as that of the Federal Radio Commission until recently, about October 2, 1939.

(f) The issue of economic injury to existing stations was considered by the Commission in its determinations as to whether public interest, convenience, or necessity would be served by granting or denying an application, in the following cases:

In re Applications of Red Oak Radio Corp. (*KICK*), Carter Lake, Iowa, and *The Palmer School of Chiropractic* (*KICK*), Davenport, Iowa, 1 F. C. C. 163, 164, 165.

In re Application of Red River Broadcasting Co., Inc. (*KGFK*), Moorhead, Minnesota, 1 F. C. C. 215, 216.

In re Application of Wichita Falls Broadcasting Co. (*KGKO*), Wichita Falls, Texas, 3 F. C. C. 386, 393.

In re Application of Dorrance D. Roderick, El Paso, Texas, 3 F. C. C. 616, 622.

In re Application of Gulf Coast Broadcasting Co., Corpus Christi, Texas, 4 F. C. C. 103, 106.

In re Application of Beaumont Broadcasting Association, Beaumont, Texas, 5 F. C. C. 139, 142.

In re Application of Genesee Radio Corp., Flint, Michigan, 5 F. C. C. 183, 186.
In re Application of Fall River Herald News Publishing Company, Fall River, Massachusetts, 5 F. C. C. 377, 382.
In re Application of The Northern Corporation (WMEX), Boston, Massachusetts, 5 F. C. C. 468, 471-472.
In re Application of R. R. Jackman, et al. (WREN), Lawrence, Kansas, 5 F. C. C. 496, 500.
In re Application of The Louisville Times Company, Louisville, Kentucky, 5 F. C. C. 554, 559.
In re Application of Dorrance D. Roderick, El Paso, Texas, 5 F. C. C. 563, 569.
In re Application of John S. Allen and G. W. Covington, Jr., Montgomery, Alabama, 5 F. C. C. 631, 635-636.
In re Application of KQV Broadcasting Co. (KQV), Pittsburgh, Pennsylvania, 5 F. C. C. 584, 593.
In re Application of Royal Miller, Sacramento, California, 5 F. C. C. 643, 644.
In re Application of The Metropolis Company, Jacksonville, Florida, Decided October 25, 1938.
In re Application of Voice of Longview (KFRQ), Longview, Texas, Decided May 31, 1939.
In re Application of Civic Broadcasting Corp., Syracuse, New York, decided October 5, 1939.

(g) Lack of "need for service" (usually with a strong economic connotation) was ground for denial of applications in the following recent cases:

In re WSMB, Incorporated, New Orleans, Louisiana, 5 F. C. C. 55, 58, Decided January 12, 1938.
In re Richard Field Lewis, Oakland, California, 5 F. C. C. 67, 68, decided January 19, 1938.
In re Banks of Wabash, Inc. (WBOW), Terre Haute, Indiana, 5 F. C. C. 78, 83, Decided January 26, 1938.
In re Glenn E. Webster, Decatur, Illinois, 5 F. C. C. 78, 83, Decided January 26, 1938.
In re John C. Hughes, Phenix City, Alabama, 5 F. C. C. 120, 123, Decided February 2, 1938.
In re Gomer Thomas, Bellingham, Washington, 5 F. C. C. 124, 125, Decided February 2, 1938.
In re T. E. Kirksey, Waco, Texas, 5 F. C. C. 129, 131, Decided February 2, 1938.

In re Food Terminal Broadcasting Company, Cleveland, Ohio, 5 F. C. C. 160, 162, Decided February 19, 1938.

In re The Journal Company, Milwaukee, Wisconsin, 5 F. C. C. 201, 212, Decided March 2, 1938.

In re Mid-Atlantic Corporation, Washington, D. C., 5 F. C. C. 201, 212, Decided March 2, 1938.

In re Dr. Wm. States Jacobs, d/b as Dr. Wm. States Jacobs Broadcasting Company, Houston, Texas, 5 F. C. C. 227, 230, Decided March 9, 1938.

In re Warren B. Worcester; San Diego, California, 5 F. C. C. 231, 233, Decided March 23, 1938.

In re Smith, Keller, and Cole, San Diego, California, 5 F. C. C. 291, 295, Decided April 13, 1938.

In re Pacific Acceptance Corporation, San Diego, California, 5 F. C. C. 296, 300, Decided April 13, 1938.

In re Juan Piza, San Juan, Puerto Rico, 5 F. C. C. 327, 330, Decided April 20, 1938.

In re Fred M. Weil, Grand Coulee, Washington, 5 F. C. C. 369, 371, Decided May 11, 1938.

In re Curtis Radiocasting Corporation, Indianapolis, Indiana, 5 F. C. C. 372, 376, Decided May 11, 1938.

In re Fall River Herald News Publishing Company, Fall River, Massachusetts, 5 F. C. C. 377, 382, decided May 11, 1938.

In re Dallas Broadcasting Company, Richard S. Gozzaldi, d/b as The Oak Cliff-Dallas County Broadcasting Company, Centennial Broadcasting Corporation, all of Dallas, Texas, 5 F. C. C. 417, 426, decided May 11, 1938.

In re Arthur E. Seagrove, Lewiston, Maine, 5 F. C. C. 430, 442, decided May 11, 1938.

In re The Louisville Times Company, et al, Louisville, Kentucky, 5 F. C. C. 554, 562, Decided June 1, 1938.

In re Clark Standiford, L. S. Coburn, and A. C. Sidner, Fremont, Nebraska, 5 F. C. C. 570, 577, decided June 1, 1938.

In re The Colonial Network, Inc., Providence, Rhode Island, 5 F. C. C. 654, 664, Decided June 22, 1938.

In re Gerald A. Travis, La Porte, Indiana, 5 F. C. C. 689, 694, Decided June 28, 1938.

In re Waterloo Times-Tribune Publishing Co., Waterloo, Iowa, 5 F. C. C. 707, 711, decided June 29, 1938.

In re Great Lakes Broadcasting Corporation, Cleveland, Ohio, 5 F. C. C. 712, 717, Decided June 29, 1938.

(h) Economic injury to existing stations was specifically relied upon as a ground for denial of applications in the following recent cases:

In re Fall River Herald News Publishing Company, Fall River, Massachusetts, 5 F. C. C. 377, 382, decided May 11, 1938.
In re Genesee Radio Corporation, Flint, Michigan, 5 F. C. C. 183, 187, decided March 2, 1938.
In re R. R. Jackman, et al. (*WREN*), Lawrence, Kansas, 5 F. C. C. 496, 500, decided May 25, 1938.
In re The Louisville Times Company, et al, Louisville, Kentucky, 5 F. C. C. 554, 559, decided June 1, 1938.
In re Arthur Lucas, Savannah, Georgia, 5 F. C. C. 464, 467, decided May 25, 1938.

(i) In the Fall River Herald News Publishing Company case, *supra,* the Commission, under a factual situation substantially identical with that of the instant case, denied the application because of economic injury to the existing station, WSAR, in Fall River, Mass.

In re Telegraph Herald. (Decided July 2, 1937.)	*In re Fall River Herald, etc.* (Decided May 11, 1938.)
(1) "The Telegraph Herald on January 20, 1936, filed an application for construction permit for a new station to be located at Dubuque, Iowa, operating on the frequency 1340 kilocycles with 500 watts daytime. * * *"	(1) "Fall River Herald News Publishing Company, Fall River, Massachusetts, commenced this proceeding by filing its application for construction permit to install a new broadcast station to operate on the frequency of 1210 kc, with power of 100 watts night, 250 watts day, unlimited time."
(2) "The applicant, Telegraph Herald, is an Iowa corporation. The original charter of the corporation was amended so as to authorize the corporation to do	(2) "The applicant is a corporation organized under the law of the State of Massachusetts with authority to operate a radio broadcast station. Its authorized

In re Telegraph Herald (Cont'd)

all things incidental to the conduct of radio broadcast business. The stockholders of the corporation are all citizens of the United States. * * *

"The assets of the corporation total $1,097,712.36, * * *. The liabilities, * * *, are fixed at $1,097,712.36. The current liabilities are fixed at $160,000, thus leaving a net worth in excess of $840,000."

(3) "The corporation is now engaged in the publication at Dubuque, Iowa, of the Telegraph Herald, a daily newspaper. The Telegraph Herald maintains a reportorial staff in the City of Dubuque of five reporters, one society editor, and has approximately 150 county correspondents as a news gathering organization. The circulation area of the paper is approximately that of the trade area of the City of Dubuque. This paper has the franchise for the Associated Press, United Press, and International News service."

(4) "* * * The approximate cost of this equipment installed will be $25,000.00.

In re Fall River Herald, etc. (Cont'd)

capital stock is $1,000,000, divided into 10,000 shares of common stock, par value $100.00 each.

"All the stock has been issued and all the stockholders are American citizens. * * *

"* * *. The company has a surplus of $824,894.51 and current assets in the amount of $335,442.77. Its average daily cash balance is above $40,000."

(3) "The applicant was originally organized as the Fall River Daily Herald Publishing Company about the year 1877 and, according to the testimony, it took its present name about 1927. At that time the Fall River Daily News had been acquired and thereafter the applicant purchased the Fall River Daily Globe. It, therefore, is at present a consolidation of three newspapers; * * *."

(4) The estimated cost of the proposed construction is $18,400. Applicant esti

In re Telegraph Herald (Cont'd)

* * * The estimated monthly operating expense of the proposed station will be approximately $2,000.00. * * *"

(5) "Dubuque, Iowa, is situated in the northeastern portion of the state upon the west bank of the Mississippi River.

"The States of Wisconsin and Illinois lie directly across the river. East Dubuque, the present location of Station WKBB, is directly east across the Mississippi River from Dubuque. * * * The population of the City of Dubuque, according to the 1930 census, is 41,679.

"* * * The population is predominately rural and native white."

(6) "Station WKBB is the only station which delivers a signal of 10 mv/m in the business section of Dubuque. * * *"

In re Fall River Herald, etc. (Cont'd)

mates the revenue from operations as proposed at $2,000 per month. The estimated monthly operating expense of the station, operated as proposed is $1,985."

(5) "Fall River is a part of the Providence-Fall River-New Bedford metropolitan district. Providence, Rhode Island, and New Bedford, Massachusetts, are respectively 18 miles west and 14 miles east of Fall River, Massachusetts.

"The population of Fall River (1930 Census) is 115,274. * * *.

"Fall River has a diversified population. At the hearing it was testified that 30 percent or more of the people are French; that still more of them are Portuguese; and that a less proportion is Italian and Polish."

(6) "The intervener, Station WSAR, is located in Fall River, operating with power of 1 kw. Station WEAN, Station WJAR, and Station WPRO, located in Providence, Rhode Island, all render service in Fall River and in the territory adjacent thereto. Station WSAR supplies the signal strength of 10 mv/m or more in Fall River. * * *"

In re Telegraph Herald (Cont'd)

(7) "* * * The statement further discloses that the station sustained a deficit for the year 1935 of $4,165.85, while the deficit for the eight months of 1936 was only $475.28, indicating an improved financial condition in the operation of the station. * * *

"The programs offered the listening public by Station WKBB are of high standard, well balanced and meritorious."

(Findings)

(8) "* * * The record shows that there is need for broadcast facilities, centered in Dubuque, to serve the trade area of that city and the surrounding rural country.

* * *

"After careful consideration of the application(s), * * * the Commission, Broadcast Division, was of the opinion, and so found, that public interest, convenience and necessity will be served by granting the application(s) of Telegraph Herald * * * for construction permit(s). * * *"

In re Fall River Herald, etc. (Cont'd)

(7) "* * * Station WSAR, acording to the testimony of the general manager of the applicant, appears to be without unlimited means although as above shown it is rendering an aceptable and sufficient service in Fall River. Station WSAR, according to the record, was established in 1921 but it has made an operating profit for only a short while immediately before the hearing of the case. * * *"

(Findings)

(8) "* * * There is nothing in the testimony before the Commission to encourage the belief that two local broadcast stations in Fall River would find sufficient financial support to sustain themselves, nor that the existing station could survive the reasonably expected rivalry of the Fall River Herald News Publishing Company, and since the performance of the existing station is acceptable and sufficient the application for permit to construct another station should be denied.

* * *

"1. The Fall River, Massachusetts, area has adequate broadcast service.

In re Fall River Herald, etc. (Cont'd)

"2. The applicant has not shown a public need for the radio broadcast service he proposes.

"3. The record does not show that sufficient commercial support could be reasonably expected to enable the existing station to continue its operations and at the same time to sustain the applicant in its proposed operations.

• • •

"5. The granting of the application under consideration would not serve public interest, convenience or necessity."

In the Genesee Radio Corporation, *supra*, the Commission in the course of its opinion stated:

"* * * Further, to permit the entry into the field of this applicant might well, from an economic standpoint, prevent the future entry into the field by an applicant who would offer a new, different, improved and competitive service."

(j) The Federal Communications Commission (prior to August 1, 1939) ordinarily refused to grant without hearing an application for a new station in a community unless it appeared that this would not aggrieve or adversely affect the interest of any licensee of an existing station in that community (see Rules 44 and 104.6, *supra*). Existing stations which might be economically injured by a new station, with but few exceptions, were always permitted to intervene as a party in the proceeding. For example, on

September 24, 1935 the Commission permitted the licensee of Station WOL in Washington, D. C. to intervene on economic grounds in opposition to the application of Monocacy Broadcasting Co. for a new station near Rockville, Maryland. (See F. C. C. Minute #235, Broadcast Division.) The Commission, in a brief justifying its position (filed in the Court of Appeals of the District of Columbia about February, 1937), asserted that it appeared from Station WOL's petition to intervene on economic grounds:

> "* * * *that the granting of the appellant's application would* aggrieve or adversely affect the interests of the intervener." *(Monocacy Broadcasting Co.* v. *Prall et al.*, 90 F. (2d) 421.)

In one instance, the Commission on August 14, 1934 denied Radio Station WREN leave to intervene upon economic grounds in opposition to the application of WHB Broadcasting Co., Inc., Docket 2423. (See *Jenny Wren Co.* v. *Sykes, et al.*, 78 F. (2d) 729.)

(k) Economic injury to existing stations (independent of the filing of petitions to intervene) was expressly made one of the issues in numerous notices of hearing recently issued by the Commission (before August 1, 1939). For example, see notices of hearing issued in the following cases:

In re Associated Broadcasters, Inc., Docket No. 5190.
In re O. W. Lyerla, Docket No. 5195.
In re Emile Denemark, Docket No. 5181.
In re A. Corensen, d/b North Western Broadcasting Association, Docket No. 5395.

The issue in these and other cases was stated as follows:

"To determine whether the economic interests of any other stations may be adversely affected."

or

"To determine whether the economic interests of any other stations or applicants may be adversely affected, particularly the following existing stations:"

(l) Also in several instances where the Federal Communications Commission granted applications without hearing the grants were reconsidered and persons protesting such grants on economic grounds were thereafter accorded a hearing. See, for example:

In re Wichita Falls Broadcasting Co., Docket No. 3240.
In re North Corp., Docket No. 4171.

(m) In the instant case the Commission permitted intervention by Sanders Bros. Radio Station on the ground of apprehended economic injury and throughout the proceedings before it the Commission recognized the issue as a legitimate one in the case. In its petition for rehearing filed before the United States Court of Appeals February 9, 1939, the Commission stated:

> "We do not wish to minimize the importance of a consideration by the Commission of the effect of competition between a proposed new station and existing stations before the Commission grants a license for the proposed new station. Unquestionably, the Commission should, in determining whether the 'public interest, convenience and necessity' will be served by the licensing of a new station in a community, give careful and painstaking consideration to the question of whether the effect of granting the new license will be to defeat the ability of the holder of any one or more outstanding licenses to carry on in the public interest. The Commission is entirely in accord with the view that if the effect of granting a new license would be to defeat the ability of the holder of an outstanding license to carry on in the public interest, the application for the new station should be denied unless there are 'overweening' reasons of a public nature for granting it. And the Commission also believes that it is obviously a stronger case where neither licensee will be financially able to render adequate service. It is the Commission's endeavor to determine in every case whether service to the public will be benefited or adversely affected by its action on an application."

(n) Up until October 2, 1939 (one month prior to the filing of its petition for writ of certiorari in this case), the Federal Communications Commission regularly permitted existing stations or other persons to intervene in hearings upon applications for new stations based upon economic injury.

Since the Commission's current Rules of Practice and Procedure (4 F. R. 3341) became effective August 1, 1939, there has been at least one instance where the licensee of an existing station was permitted to intervene upon economic grounds. On September 15, 1939 Station WLBZ was permitted to intervene on this ground in opposition to the application of WABI, Bangor, Maine (Docket No. 5677).

On October 2, 1939 (one month prior to filing the petition for writ of certiorari herein), however, the Commission refused to permit Orlando Broadcast Company, Inc., licensee of Station WDBO, Orlando, Florida, to intervene on economic grounds in the hearing upon the application of Hazelwood, Inc. for a new station in Orlando, Florida, Docket No. 5698. A formal opinion denying the petition to intervene was rendered by the Commissioner presiding at the Motions Docket. The denial of intervention was affirmed by the Commission *en banc* October 11, 1939.

2. *Actions on Transfers of License or Control under Sec 310(b).*

Economic considerations were taken into account in the Commission's decisions as to "public interest" in giving or refusing its consent to the following transfer or assignment applications:

In re Pickwick Broadcasting Corp. et al, Docket Nos. 960, 964, 976 & 981, Decided May 29, 1931.

In re Kingshighway Presbyterian Church, et al, Docket Nos. 1012, 1011 & 1010, Decided June 12, 1931.

In re Oklahoma College for Women, et al, Docket Nos. 1243, 1244 & 1249, Decided October 30, 1931.

In re Ohio Broadcasting Corp. et al, Docket Nos. 1168, 1175, 1173 & 1387, Decided December 22, 1931.

In re William S. Pate, Docket No. 1302, Decided January 18, 1932.

In re Pine Tree Broadcasting Corp. et al, Docket Nos. 1233 & 1446, Decided April 1, 1932.

In re Hale Bros. Stores, Inc., et al, Docket Nos. 1615 & 1614, Decided June 10, 1932.

In re WJSV, Inc., Docket No. 1656, Decided June 10, 1932.

In re Homer F. Bryant, d/b Bryant Radio & Electric Co. et al, Docket Nos. 1375, 1470, 1412, 1465, 1467 & 1473, Decided July 1, 1932.

In re Arthur Faske, et al, Docket Nos. 1501, 1538, 1784 & 1785, Decided November 18, 1932.

In re F. J. Reynolds, Docket Nos. 2180 & 2181, Decided December 9, 1933.

In re Earle C. Anthony, Inc., et al, Docket Nos. 1830, 1992, 1956, 1963, 1964 & 1957, Decided January 26, 1934.

In re KRGV, Inc., Docket Nos. 2144, 2149, 2207 & 2253, Decided June 22, 1934.

In re Red Oak Corp., 1 F. C. C. Rep. 163, Decided October 2, 1934.

In re Gillette Rubber Co., 2 F. C. C. Rep. 127, Decided September 24, 1935.

In re Lancaster Broadcasting Service, Inc., et al, 2 F. C. C. Rep. 164, Decided October 28, 1935.

In re United States Broadcasting Corp., et al, 2 F. C. C. Rep. 208, Decided December 17, 1935.

In re Western Broadcasting Co., 3 F. C. C. Rep. 179, Decided August 18, 1936.

In re First Congregational Church of Berkeley, 3 F. C. C. Rep. 417, Decided October 20, 1936.

In re W. J. Reynolds, Jr., J. C. Hughes and J. S. Allen, d/b as Selma Broadcasting Company, 4 F. C. C. Rep. 382, Decided July 20, 1937.

In re United States Broadcasting Corporation, et al, 4 F. C. C. Rep. 521, Decided June 29, 1937.

In re The WGAR Broadcasting Company, 4 F. C. C. Rep. 540, Decided July 2, 1937.

In re William Penn Broadcasting Company, et al, 4 F. C. C. Rep. 627, Decided September 21, 1937.

In re R. S. Bishop, transferor, and Mrs. Ruth G. Roosevelt, transferee, 5 F. C. C. Rep. 301, Decided April 13, 1938.

In re Exchange Avenue Baptist Church of Oklahoma, 5 F. C. C. Rep. 333, Decided April 20, 1938.
In re P. R. Jackman, et al, 5 F. C. C. Rep. 496, Decided May 25, 1938.
In re J. L. P. Robinson, 5 F. C. C. Rep. 623, Decided June 22, 1938.
In re Anna Atkinson, Docket No. 4945, Decided August 10, 1938.
In re W. W. McAllister, Docket No. 4981, Decided September 6, 1938.
In re Fifth Avenue Broadcasting Corporation, Docket No. 4969, Decided September 6, 1938.
In re Associated Broadcasters, Inc., Docket No. 4208, Decided October 18, 1938.
In re Charles H. Gurney, Docket No. 4827, Decided October 18, 1938.
In re The Travelers Broadcasting Service, Docket No. 4692, Decided November 1, 1938.

By way of illustration—the Commission in its decision upon the assignment application of Frank P. Jackson, Docket No. 2207 (cited above In re KRGV, Inc), made the following statement in its findings:

> "It is to be expected, of course, that on the removal of Station KWWG to Port Arthur, Station KFDM, Beaumont, would lose certain broadcasting business this station has had from Port Arthur College. Station KFDM represents a substantial investment of capital, and it appears that the operation of the station by the interveners has resulted in losses over certain periods. The interveners have not shown sufficient reasons or grounds, however, to warrant keeping the Port Arthur area open for the business of the intervener's station to the exclusion of the establishment of a broadcast service in that city."

The Commission in its decision upon the application of F. J. Reynolds, Docket No. 2180, *supra*, made the following finding:

> "* * * it appears that economic conditions favor the proposed move. Tampa has a population of about

101,000, while Jacksonville has a population of about 140,000. A comparison of the business activities of the two cities on the basis of the somewhat general evidence we have indicates that the larger city, as would logically be expected, has more busines and more industries from which radio stations might draw commercial support."

Also in the majority of cases above cited, the Commission in determining whether or not to grant or refuse its consent in the public interest to the transfer of control or assignment of license applications, took into consideration the amount of the purchase price. (See cases collected in Federal Communications Bar Journal, November, 1938, pp. 16-29).

A departure from this practice was first evidenced in the Commission's decision upon the application of *City of Atlantic City*, Docket Nos. 5350 and 5351, decided October 26, 1939.

3. *Actions on Permits to Export Radio Programs Under Sec. 325*

The Commission in its decision of July 28, 1939 upon the application of Mutual Broadcasting System, Inc., Docket No. 5219, for authority to transmit programs to Canada as provided in Section 325 of the Act, took into account economic considerations in determining that the granting of the application would serve public interest, convenience, and necessity. The Commission in its findings held:

"4. This record does not disclose sufficient facts to justify Station WJBK's claim that it has been impaired by unfair practices. Therefore, at this time, consideration of the maintenance of a free interchange of programs with stations licensed by the Government of Canada outweighs the present suggestion of possible adverse effect upon the service rendered by the American station."

In its decision *In re Nellie H. and W. C. Morris, d/b Hotel Eagle*, 2 F. C. C. Rep. 269, the Commission in denying a permit pursuant to Section 325(b) said (p. 271):

> "It appears from the record that acceptable broadcasting service is now received from several stations in the listening area covered by Station XEPN, and these include KTSA and WOAI. * * *
>
> "The Commission considers, as an element of public interest, the economic factor involved in this application. Against this, however, it must weigh the need for this service, the character of the service rendered by this station, the fact that the applicants have no control over the programs to be transmitted from their studio, and can exercise no censorship over them, * * *."

The Commission, *In re T. Yount, d/b Universal Advertising Agency*, 2 F. C. C. Rep. 200, found that public interest, convenience, or necessity would not be served by granting an application as required by Section 325. In the course of its opinion the Commission said (p. 205):

> * * * There is no substantial evidence of any demand for advertising service to be supplied by the applicant; the only sales the Universal Advertising Agency solicitor, who works for a commission, has been able to make have been so-called spot announcements presented without sponsored programs. None of the testimony adduced on this subject is regarded as having any substantial probative value, but it is reported here as being the gist of the evidence relating to public interest in the plan presented by the applicant, who has the burden of showing that there exists a public necessity for the proposed service."

IV. *Exercise of Regulation-Making Powers Under Sec. 303.*

The matter of economic injury and competitive effect have frequently been considered relevant by the Commission in applying the standard of "public convenience, interest, or necessity" to its regulation-making functions under Section 303.

(a) The Federal Radio Commission in its notices of hearing (August 27, 1930) upon the applications of the licensees of WHAM and 23 other stations for authorization to increase power to 50 kw., involving amendment of regulations then in force limiting the number of 50 kw. stations, expressly included the following issue:

> "The granting of this application may aggrieve or adversely affect the interest of a holder of a permit, license, or other instrument of authorization from the Commission, or of an applicant therefor."

In the course of its opinion on the above so-called "high-power" cases of 1930, *In re Stromberg-Carlson Telephone Manufacturing Company, et al.*, Docket Nos. 870 et seq., dated November 17, 1931, the Commission said:

> "The installations requested by these applications involve expenditures of large sums of money. Stations may be required to forfeit facilities for many reasons, among which are the above, and as a result thereof suffer loss in investment and property. This possibility would be minimized if General Order 42 were adhered to. The Commission should hesitate to permit the expenditure of money with knowledge that it may soon be forced to require the wholesale scrapping of property. A proper application of the statutory standard, requires that the Commission take these and many other factors into consideration in promulgating an order of general application. * * *"

(b) Economic issues were extensively considered by the Commission in its hearings and reports preparatory to the

adoption of its currently effective rules governing standard broadcast stations and standards of good engineering practice (4 F. R. 2714, and 2862).

The "notice of informal hearing before the Broadcast Division of the Federal Communications Commission, beginning October 5, 1936," Docket No. 4063, contained the following issue on the allocation proposals, *inter alia*, for increase of power of clear channel stations to 500 kw:

> "VI. *Effect of any proposals regarding the foregoing subjects.*
>
> "1. Socially and economically, upon the public and the industry."

On January 11, 1937 a 43 page preliminary engineering report to the Broadcast Division presenting findings and conclusions based on the evidence heard at the October 5, 1936 hearing was rendered in which the following recommendations were made (p. 8):

> "(14) While we believe that powers in excess of 50 kw on clear channels are technically sound and are in accord with scientific progress, we recognize that *social and economic factors* involved in the use of 500 kw *may outweigh in importance engineering considerations*, and request instructions from the Division as to its desires with respect to regulations on the question of super-power. We feel that, in the matter of super-power, the Commission should give full consideration to our report summarizing the economic testimony in the October 5 hearing prior to making a decision.
>
> * * * * * *
>
> "(18) We suggest *the paramount importance of economic and social factors* in the determination of the distribution of facilities to licensees in any section of the country, and state that a separate report will be submitted giving in detail a summary of the evidence presented at the October 5 hearing prior to making a decision." (Italics supplied.)

—(Mimeograph Release No. 19557)

On January 24, 1938 there was released a report (dated July 1, 1937), on Social and Economic Data Pursuant to the Informal Hearing on Broadcasting, Docket No. 4063, in which the following extracts appear (see Mimeograph Release 23454, 132 pages, with extensive appendices A-K inclusive, pp. 9, 11, 12):

"Section II.

"Importance of Social and Economic Factors

* * * * *

"B. Definitions of 'Social' and 'Economic'

* * * * *

"(2) 'ECONOMIC.' The aspects of radio broadcasting with its activities as a business. Included in this category are:

* * * * *

"(c) The economic problems raised by the *competitive aspects* of the broadcast structure, including competition between individual stations, competition between classes of stations, competition between network on the one hand and individual stations on the other, and competition between networks themselves. Related to this group of problems are others which must be passed over with mere mention, such as competition by broadcasting stations, organizations or groups for the sources and materials of program service, including music, talent, etc. The underlying doctrine of the Communications Act of 1934 is rightfully that which encourages competition and discourages monopoly in any form both direct and indirect."

(p. 121):

"The question of the technical feasibility of power in excess of 50 kw has been discussed in the Engineering Department's January report, which indicated that powers as great as 500 kw are technically sound.

"On the other hand, the evidence shows that there will be economic effects, particularly if many stations should be granted such power as 500 kw. We are un-

able to predict the absolute degree of good or bad effects because of the lack of substantial evidence, and because to predict whether or not an individual application for super power would be in the interest of the public, would amount to prejudicial determination of all the merits or demerits of any specific application. Therefore it appears to the Engineering Department that the Commission must consider each individual application on the basis of the evidence presented. Nevertheless, even in the determination of individual cases the Commission should proceed with caution and assure itself that all the elements are properly presented or considered in the disposition of such applications." In this connection, when applicants for licenses to operate stations with powers in excess of 50 kw are heard by the Commission, they and all other interested parties should be given the opportunity to present evidence *on the broad social and economic effects* of such super power operation." (Italics supplied.)

* * * * * *

"V. Conclusions.

* * * * * *

"7. *The competitive effect* of 500-kw stations upon regional stations and local stations remains primarily speculative. The comparatively narrow margin existing between technical costs on a 500-kw basis and probable revenues seems to indicate that an intensification of competition, wherever this is possible, will ensue. But the extent of this competition, its exact nature, and its ultimate effect remain speculative." (Italics supplied.)

(c) On June 6, 1938 a hearing before a Special Committee of Commissioners was held on the "Proposed Rules Governing Standard Broadcast Stations and Standards of Good Engineering Practice," Docket No. 5972-A. The Commission's notice of hearing (February 21, 1938), included the following issues:

"7. To determine whether an increase in power on clear channels will tend to or result in a decrease in competition between stations and whether the service to the public will be affected thereby.

"8. To determine what charges will be necessary to support the operation of clear channel stations at additional power, whether such charges may be borne by the commercial support available and whether such charges will have an adverse effect upon the character of program service rendered."

On April 4, 1938 the Commission issued formal notices of hearing on pending applications for increase in power to 500 kw (see Docket. Nos. 4165, 4230, 4361, 4419, 4093, 4110, 4164, 4024, 4090, 4091, 4092, 2779, 3962, 3963 and 3985). One of the issues set forth in said notices of hearing was:

"9. To determine whether the interference or *conflict in any other manner* may be had with the interests of any other licensed broadcast stations." (Italics supplied.)

On January 18, 1939 said Committee of Commissioners issued Part I of its report, consisting of 31 pages (mimeo-

graph No. 31703). On April 1, 1939 Part II of said report was released, consisting of 149 pages together with extensive appendices (mimeograph release Nos. 32825 and 32825-A).

The following illustrates the extensive consideration given to economic factors (Sec. II, pp. 8, 10):

"Super Power.

* * * * *

"The evidence shows conclusively that, from a technical standpoint, the use of power in excess of 50 kw has a distinct advantage because it provides better quality service to the vast population residing in rural areas and in towns which neither have broadcasting stations of their own nor are located within the primary service area of any station. * * *

"Unfortunately, however, the evidence also indicates that there are possible *disadvantages of an economic and social character* in removing the power limitation. * * * (Italics supplied.)

"Thus the question of super power, from the standpoint of the general public throughout the nation as a whole, involves a determination of whether the resulting advantages to be gained in the improvements of radio service to listeners in rural areas by means of super power operation from a few stations properly located in the country, are outweighed by the possible disadvantages resulting from *adverse economic effects of such super power operation upon a large number of smaller power stations primarily serving the smaller Metropolitan areas.* * * *. (Italics supplied.)

* * * * *

"In view of the foregoing considerations, the Committee recommends that the proposed rule be not changed at this time, but in lieu thereof, that the Commission proceed on a more intensive accumulation of facts and a consequent study of *the economic factors involved.* * * *" (Italics supplied.)

(p. 4)

"Practical Aspects.

"* * * It is essential therefore that the Commission give proper weight to the economic and engineering factors inherent in the successful operation of a nation-wide broadcasting system. While it is impossible to divorce the social use of broadcasting facilities from engineering and economic limitations, and while the first consideration of the Commission must be that of securing the finest radio transmission facilities possible, *the second responsibility of the Commission is that of making radio service operate in the public interest in such a manner that the structure of broadcasting is sound economically as well as technically.*" (Italics supplied.)

The Commission's Rules Governing Standard Broadcast Stations (4 F. R. 2714) and Standards of Good Engineering Practice (4 F. R. 2862) were adopted June 23, 1939, effective August 31, 1939. The Commission's reason for refusing to authorize the use of power in excess of 50 kw was summarized in its Annual Report to Congress. (F. C. C. Annual Report, June 30, 1939, p. 40):

"(4) * * *

* * * * *

"(e) * * *

"There is no doubt, from an engineering standpoint, that the use of power in excess of 50 kilowatts constitutes one method whereby additional service can be provided throughout the remote sparsely populated sections of the United States and to many small urban centers which now lack facilities or where it is not economically practical to support local or regional channel stations. However, for social and economic reasons the rules do not contemplate the use of power greater than 50 kilowatts at this time."

(d) On November 14, 1938 the Commission held a hearing *In re Investigation of Chain or Network Broadcasting,*

etc., Docket No. 5060. The hearing was instituted pursuant to Order No. 37, issued March 18, 1938, which provided in part:

> "That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters including those covered in the Report on Social and Economic Data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938."

One of the issues set forth in the Commission's notice of hearing was:

> "10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally."

The network investigation hearing was concluded May 19, 1939. No report has yet been issued. Competition between networks, stations affiliated with networks, and non-affiliated stations was among the more important issues covered by the hearing.

(e) Section 4.43 of the rules relating to international broadcast stations sets forth the restrictions placed upon programs. Subsections (1) through (5) of Section (b) of Rule 4.43 set forth the restrictions upon the broadcasting of commercial programs. These subsections are as follows:

> "1. Commercial program continuities give no more than the name of the sponsor of the program and the name and general character of the commodity, utility or service, or attraction advertised.

"2. In case of advertising a commodity, the commodity is regularly sold or is being promoted for sale on the open market in the foreign country or countries to which the program is directed in accordance with subsection (c) of this section.

"3. In case of advertising an American utility or service to prospective tourists or visitors to the United States, the advertisement continuity is particularly directed to such persons in the foreign country or countries where they reside and to which the program is directed in accordance with subsection (c) of this section.

"4. In case of advertising an international attraction (such as a world fair, resort, spa, etc.) to prospective tourists or visitors to the United States, the oral continuity concerning such attraction is consistent with the purpose and intent of this section.

"5. In case of any other type of advertising, such advertising is directed to the foreign country or countries and to which the program is directed in accordance with subsection (c) of this section and is consistent with the purpose and intent of this section."

Rule 4.43 was suspended by the Commission on July 14, 1939 and is not yet effective. It was suspended because of the provisions of Section (a) of Rule 4.43, stating that an international broadcast station shall render only service which will "reflect the culture of this country and which will promote international goodwill, understanding and cooperation." In July, 1939, the Commission held a hearing, at which time evidence was introduced relating to the propriety of Section (a) of Rule 4.43.

(f) Other indications of the consideration by the Commission of economic factors in the allocation of broadcast stations is shown by the proposed television rules which were set for public hearing January 15, 1940. The proposed television rules are contained in a release of the Commission, dated December 26, 1939 (Mimeograph No. 38225). That

the Commission is taking economic factors into consideration, is shown particularly by Section 4.73(c), which states:

> "(c) Quarterly reports shall be made to the Commission by Class II television broadcast stations of the charges and costs as well as of other pertinent information which may be of assistance to the Commission in evaluating the economic feasibility of television broadcasting as a regular service to the public on a commercial basis."

Other subsections of 4.73 are also relevant. Subsection (a) provides:

> "(a) No charges either direct or indirect shall be made for either the production or transmission of either aural or visual programs by Class I television stations;"

Subsection (b) provides:

> "(b) No charges either direct or indirect shall be made for the transmission of either aural or visual programs by Class II television stations; however, Class II television broadcast stations may make charges to cover cost of program production, including advertising material, which programs may be transmitted as an experimental program service but without charge for such transmission;"

Subsection (d) provides:

> "(d) The offering by any person of the facilities of any television broadcast station on a regular commercial basis is prohibited. The limited commercialization permitted under subsection (b) above shall not take precedence over the experimental service, but shall in fact be subordinated to it."

V. *Exercise of Inquisitorial Functions.*

(a) The Commission from time to time has required detailed financial reports from radio station licensees and from network organizations. The gathering of such material has been justified on the ground that it was pertinent to the performance of various of the Commission's functions in the regulation of radio broadcasting and particularly in the exercise of its regulation-making powers.

On January 1, 1939 the Commission put into effect the following rule (p. 45):

> "Sec. 15.11 *Financial Statements.* Each licensee of a standard broadcast station shall file with the Commission on or before March 1 of each year on Forms 705 and 706, or such other forms as may be prescribed by the Commission, a balance sheet showing the financial condition of the licensee as of December 31 of the preceding year and an income statement for the preceding calendar year. Each such form shall be subscribed as provided in Section 7.01."

These forms (705 and 706) required information as identified by the following headings: General balance sheet; Unappropriated earned surplus; Undistributed profits; Broadcast plant in service of licensee; Broadcast plant leased to others; Improvements and replacements of broadcast plant leased from others; Leaseholds and other intangibles in broadcast service of licensees; Station broadcast revenues; Sale of station time to networks; Sale of station time to stations; Broadcast expenses; Total compensation of employees by months; Employees and their compensation for the week beginning December 11, 1938; Types of sustaining program material broadcast, and Types of commercial program material broadcast; Income statement for the year.

On August 1, 1939 the Commission put into effect Rule 1.361, being substantially similar to the preceding Rule 15.11 *supra.*

On January 15, 1940 the Commission, pursuant to Sec. 1.361, *supra*, released new financial report forms (mimeograph release No. 38522). One form consists of a 21 page booklet entitled "Annual Financial Report for Standard Broadcast Stations and Networks" which has the following schedules: General balance sheet; Analysis of unappropriated earned surplus; Analysis of undistributed profits; Tangible property owned and devoted exclusively to broadcast service by the respondent; Intangible property owned and devoted exclusively to broadcast service by the respondent; Property intended for use in broadcast service and leased to others; Income statement; Analysis of station broadcast revenues; Analysis of time devoted to networks; Analysis of broadcast expenses; Total compensation of proprietors, partners, broadcast staff, employees, officers, musicians and other talent; Employees and their compensation for the week beginning October 15, 1939.

The second form consists of a 13 page booklet entitled "Instructions Relating to Annual Financial Report."

In addition to the foregoing, the Commission's renewal application, Federal Communications Commission form 303, requires such information as the following: Average percent of time per month devoted to commercial programs; Average number of hours sold per month; Average gross income per month, etc.

(b) Heretofore, the Commission, on complaint or otherwise, has conducted investigations into business practices of radio station licensees. In numerous instances as a result of such investigations, the renewal applications of such licensees have been set down for hearing. By way of illustration—this work is summarized in the First Annual Report of the Federal Communications Commission, 1935, (pp. 16, 17):

> "In the past fiscal year there has been a notable increase in complaints to the Commission of stations broadcasting objectionable programs, and the Com-

mission has made an extensive inquiry into these complaints under the provisions of the Communications Act of 1934 and its rules and regulations promulgated pursuant thereto. Formal action was taken with regard to 226 separate objectionable programs broadcast over 152 stations. Some action was taken with regard to a much larger additional number of complaints involving several more stations, but these were adjusted informally. The broadcasting of false, fraudulent, and misleading advertising in various guises has been the chief source of complaint. In many instances the Federal Trade Commission, the Post Office Department, and the Food and Drug Administration had taken action to curtail the objectionable activities of medical advertisers in printed form, the result being that these advertisers resorted to broadcasting in order to disseminate their misleading and often fraudulent sales propaganda. This section handles all matters of inquiry and enforcement from their initial stages to final Commission action."

By way of further illustration, the Commission on November 20, 1939 ordered the grantee of a construction permit, Kentucky Broadcasting Corporation, to show cause why its permit should not be cancelled (see mimeograph release No. 37603). The action arose out of an allegation of competitive injury to Kentucky Broadcasting Corporation (Louisville, Kentucky) by reason of additional hours of operation granted to Station WGRC in an adjacent community (New Albany, Indiana). Station WGRC had been granted night-time hours of operation without hearing, October 10, 1939.

APPENDIX C.

Miscellaneous Documents.

Petitioner's motion to dismiss in the United States Court of Appeals for the District of Columbia. (Filed Jan. 24, 1938).

"Now comes the Federal Communications Commission and moves to dismiss the above-entitled appeal for the following reason, to wit:

"This Court is without jurisdiction to entertain the proposed appeal because it appears from the face of the Notice of Appeal and Reasons Therefor on file herein that said appeal has not been taken within the time provided by Section 402(c) of the Communications Act of 1934 (48 Stat. 1093), viz., twenty days from July 27, 1937, the effective date of the decision of the Commission of which appellant complains.

"Wherefore, the Federal Communications Commission prays that this Court enter its Order dismissing this appeal.

"FEDERAL COMMUNICATIONS COMMISSION

By (sgd) HAMPSON GARY,
General Counsel.

(sgd) GEO. B. PORTER,
Assistant General Counsel.

(sgd) FANNEY NEYMAN,
Assistant Counsel."

Excerpts from Commission's Petition for Rehearing.

(Filed in the United States Court of Appeals for the District of Columbia Feb. 9, 1939)

Petition for Rehearing and Motion for Stay of Mandate.

"To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

"The Federal Communications Commission petitions the court to reconsider its decision of January 23, 1939 reversing the decision of the Commission rendered July 2, 1937 granting the application of Telegraph Herald for a construct ı permit authorizing the construction and operation of a radiobroadcast station at Dubuque, Iowa, on 1340 kc, 500 watts, daytime only.

"The Commission respectfully submits that (1) a fundamental jurisdictional question which is present in this case has not heretofore been argued to this court and was not considered by this court in its decision, and (2) a fundamental question going to the merits of this appeal has not heretofore been argued to this court and was not considered by the court in its decision.

"This petition has been filed because the two fundamental questions referred to above are of such character and importance that the Commission does not consider it appropriate to raise them in an application for certiorari to the Supreme Court without having first raised them before this court.

* * * * *

"The Fundamental Jurisdictional Question in this Case.

"The fundamental jurisdictional question in this case is whether a appeal can be taken to this court under Section 402(b)(2) of the Communications Act of 1934 by

a person whose appealable interest arises from prospective pecuniary damage resulting from competition.

"The Fundamental Question on the Merits.

"The fundamental question on the merits of this case, assuming the appellant has an appealable interest, is whether the Commission is required by the Communications Act of 1934 to make any findings of fact where it grants an application under Section 309(a) of the Act.

"Reasons Why These Fundamental Questions Were Not Previously Raised by the Commission.

"The Commission did not raise either the aforementioned jurisdictional question or the question of the necessity for making findings when the Commission grants an application under Section 309(a) of the Act because neither of those points was considered to be a *sine qua non* of the Commission's case in this appeal. As to the jurisdictional question, the Commission heretofore took the position that the appellant could not sustain its allegation of economic injury through the establishment of the additional station by the intervener. In other words, the Commission heretofore assumed, *arguendo,* that financial loss as a result of competition from a broadcast station authorized by order of the Commission, if proved, would constitute a basis for an appeal under Section 402(b)(2) of the Act, and argued that the appellant in this case has failed to prove its alleged economic injury. The jurisdictional point now raised is, assuming *arguendo* that the appellant can prove that it will suffer pecuniary loss from competition with the new station of the intervener, such loss is *damnum absque injuria.*

"As to the necessity for findings by the Commission on the question of economic injury to the appellant, the Commission's position heretofore has been that, assuming, *arguendo,* the necessity for findings on this subject, the Com-

mission has made adequate findings. The point raised in this Petition for Rehearing is that, assuming *arguendo* that the Commission has not made findings on the subject of economic injury to the appellant by the establishment of the new station of the intervener, the Commission's decision is not defective for this reason because it is not necessary for the Commission to make any findings when it grants an application for a construction permit under Section 309(a) of the Act.

* * * * *

"Argument.

This Court Has no Jurisdiction to Entertain this Appeal Because the Appellant Has no Appealable Interest Under Section 402(b) (2) of the Communications Act of 1934.

* * * * *

"The Commission's argument is this: The issue of 'economic injury to an existing station through the establishment of an additional station' is not sufficient to furnish proper grounds of contest on appeal under Section 402(b) (2) of the Communications Act of 1934 because it tenders an issue of *damnum absquo injuria*.

* * * * *

"We do not wish to minimize the importance of a consideration by the Commission of the effect of competition between a proposed new station and existing stations before the Commission grants a license for the proposed new station. Unquestionably, the Commission should, in determining whether the 'public interest, convenience and necessity' will be served by the licensing of a new station in a community, give careful and painstaking consideration to the question of whether the effect of granting the new license will be to defeat the ability of the holder of any one or more outstanding licenses to carry on in the public in-

terest. The Commission is entirely in accord with the view that if the effect of granting a new license would be to defeat the ability of the holder of an outstanding license to carry on in the public interest, the application for the new station should be denied unless there are 'overweening' reasons of a public nature for granting it. And the Commission also believes that it is obviously a stronger case where neither licensee will be financially able to render adequate service. It is the Commission's endeavor to determine in every case whether service to the public will be benefited or adversely affected by its action on an application.

"It is also the Commission's position that whenever the Commission, in considering an application for a new station does not so apply the standard of public interest, convenience and necessity as required by the statute, this court, *upon an appeal properly taken*, may and should set aside the decision of the Commission. But, however improperly the Commission may have acted in a given case, there is no jurisdiction for this court to entertain an appeal from the decision of the Commission in such case under Section 402(b)(2), unless the appeal is brought by a person who is 'aggrieved' or whose interests are 'adversely affected', by the Commission's decision. If an erroneous decision of the Commission does not invade a person's legal rights or legal interests such person has no standing to invoke the appellate jurisdiction of this court to review the action of the Commission, and this court may not, regardless of the merits of the case, assume jurisdiction.

"It is submitted that the court should hold that no person, whether he be a licensee of an existing radiobroadcast station located in the same city, or in some other city, or whether he be engaged in some other form of advertising, suffers any legal injury from competition which results from the establishment of a new radiobroadcast station, even though the establishment of such station may cause such person substantial financial damage.

* * * * *

"Assuming the Court has Jurisdiction, the Court Erred in Remanding the Case for the Purpose of Making Findings.

* * * * * *

"The Commission's argument is this: Although the statute requires the Commission to make findings in cases where it denies an application under Section 309(a), the statute does not require the Commission to make any findings when it grants an application under Section 309(a). Whether or not the Commission makes findings in cases where it grants applications is entirely a matter of administrative discretion and not a fullfilment of a statutory duty. The issuance of findings in cases where the Commission grants an application is analogous to announcements made by other agencies of their reasons for executive or administrative action under their respective statutes. Such announcements may, in the discretion of the agency, be as complete or as meager as the agency chooses.

* * * * * *

"For the foregoing reasons, it is respectfully requested that the Court vacate its judgment in the instant case and in the alternative either dismiss this appeal or affirm the decision of the Commission.

"Respectfully submitted,

"FEDERAL COMMUNICATIONS COMMISSION,
(sgd) WILLIAM J. DEMPSEY,
General Counsel.
(sgd) WILLIAM C. KOPLOVITZ,
Assistant General Counsel.

APPENDIX D.

ADDITIONAL RELEVANT PROVISIONS OF THE COMMUNICATIONS ACT OF 1934.

The relevant sections of the Communications Act of 1934 not found in the Appendix to the Commission's brief are as follows:

"Definitions

"Sec. 3. For the purposes of this Act, unless the context otherwise requires—

* * * * *

"(o) 'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

* * * * *

"Provisions Relating to the Commission

* * * * *

"Sec. 4. * * *

* * * * *

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

"(l) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

* * * * *

"General Powers of Commission

"Sec. 303. Except as otherwise provided in this Act; the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

* * * * *

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

* * * * *

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

"(h) Have authority to establish areas or zones to be served by any station;

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

"(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

"(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

* * * * *

"Applications for Licenses; Conditions in License for Foreign Communication

"Sec. 308 (a) * * *

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

"Limitation on Holding and Transfer of Licenses

"Sec. 310. (a) The station license required hereby shall not be granted to or held by—

"(1) Any alien or the representative of any alien;

"(2) Any foreign government or the representative thereof;

"(3) Any corporation organized under the laws of any foreign government;

"(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

"(5) Any corporation directly or indirectly controlled by any other corporation of which any officer

or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

"Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

* * * * *

"Construction Permits

"Sec. 319. (a) * * *

"(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of

said station. Said license shall conform generally to the terms of said permit.

* * * * *

"False Distress Signals; Rebroadcasting; Studios of Foreign Stations

"Sec. 325. (a) * * *

"(b) No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

"(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modifications thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the interest.

"Censorship; Indecent Language

"Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

* * * * *

"Reports of Investigations

"Sec. 404. Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

* * * * *"